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CASES

IN THE

COURT OF COMMON PLEAS

AND

EXCHEQUER CHAMBER.

BY

JOHN SCOTT,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. I.

MICHAELMAS, HILARY, AND EASTER TERMS, 5 WILL. IV.

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1835.

JUDGES

OF

THE COURT OF COMMON PLEAS.

The Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Knt., L. C. J.
The Hon. Sir JAMES ALLAN PARK, Knt.
The Hon. Sir STEPHEN GASELEE, Knt.
The Right Hon. Sir JOHN VAUGHAN, Knt.
The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

ERRATA.

Page 51, *Note, last line but two, for* Ante, Vol. 3, p. 812, *read* 3 M. & Sc. 812.
———-, *last line, for* Ante, Vol. 4, p. 488, *read* 4 M. & Sc. 488.
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80, *Second line from the bottom, for* laid *read* land.
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166, *Note, line* 7, *for* Ante, Vol. 2, p. 619, *read* 2 M. & Sc. 619.
———— 8, *for* Ante, Vol. 3, p. 370, *read* 3 M. & Sc. 370.

[redacted]

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there made the same payable at Messrs. Williams, Burgess, & Co.'s; that the said Joseph Keats indorsed the bill to the defendants, and the defendants indorsed the same to Alzedo before he became bankrupt; and that, after Alzedo became bankrupt, the bill was duly presented at the said Messrs. Williams, Burgess, & Co.'s for payment thereof, and payment required, and refused: of all which said several premises *the defendants had notice;* by means whereof the defendants became liable to pay to the plaintiffs the said sum of money in the said bill specified, upon request; that, being so liable, the defendants promised to pay when requested.

The defendants pleaded the general issue.

The cause came on for trial at the London Sittings, after Hilary Term, 1828, before Lord Chief Justice Tenterden and a special jury. The bankruptcy of Alzedo and the appointment of the plaintiffs as his assignees, were admitted by the defendants, and also the drawing, acceptance, and indorsement of the bill. The plaintiffs then proved that the bill was duly presented for payment at Messrs. Williams, Burgess, & Co.'s, on the day on which it became due; that payment was refused; that the bill was returned to the plaintiffs for non-payment on the 16th

above set forth was not a sufficient notice of the dishonour and non-payment of the bill to entitle the plaintiffs to support the action against the defendants. The jury accordingly found a verdict for the defendants. The plaintiffs' counsel thereupon tendered a bill of exceptions.

Judgment having been given for the defendants in the court of King's Bench, a writ of error was brought in the Exchequer Chamber, and special errors were assigned, which, in Easter Term, 1831, were argued before the judges of the courts of Common Pleas and the Exchequer, when the judgment of the court of King's Bench was affirmed—the Court holding "that the notice of dishonour should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount" (*b*).

Upon this judgment, the plaintiffs have brought a writ of error in parliament, and assigned several special errors, in substance alleging that the opinion given by the Lord Chief Justice to the jury upon the trial was wrong, and that the letter written and sent by Messrs. I. & S. Pearce to the defendants was a sufficient notice of the dishonour and non-payment of the bill to entitle the plaintiffs to maintain the action.

The defendants joined in error, and the case was now argued by—

Mr. *F. Pollock* and Mr. *R. V. Richards*, for the plaintiffs in error (*c*); and by—

Mr. *Whately*, for the defendants in error.

has been refused by the acceptor; and therefore that a letter merely containing a demand for payment was not a sufficient notice.

(*b*) See 5 Moore & Payne, 475; 7 Bing. 530.

(*c*) The authorities principally relied on for the plaintiffs were Tindall *v.* Brown, 1 Term Rep. 170, and Bayley on Bills, 4th edit. p. 206.

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Mr. Justice PARK said, that it was the unanimous opinion of the judges who were present at the argument (*d*) that the letter set forth in the case was not a sufficient notice of the dishonour of the bill to entitle the plaintiffs to maintain the action.

The Lord Chancellor (Lord BROUGHAM and VAUX) now said, that the House affirmed the judgment of the Exchequer Chamber, with costs (not exceeding 350*l.*), on the ground that the writ of error was improperly brought after the decision in *Hartley* v. *Case*, the unanimous judgment of the Exchequer Chamber, and the statement of the settled law upon the subject in the 5th edition of Bayley on Bills.

Judgment affirmed.

(*d*) The judges present were—Mr. Justice Park, Mr. Justice Gaselee, Mr. Justice Vaughan, Mr. Justice Littledale, Mr. Justice Taunton, Mr. Justice Patteson, Mr. Baron Alderson, Mr. Baron Bolland, and Mr. Baron Williams.

Friday,

In re THE LONDON AND WESTMINSTER BANK.

[redacted]

this question—'Are the provisions of this bill inconsistent with the Bank of England's rights as secured to it under the following acts—5 William & Mary, c. 20, 8 & 9 William & Mary, c. 20, 6 Anne, c. 22, 15 Geo. 2, c. 13, 21 Geo. 3, c. 60, 39 & 40 Geo. 3, c. 28, and 3 & 4 Will. 4, c. 98?'"

The judges entertaining a doubt as to whether they could properly entertain the question, requested permission to retire and confer: after a short absence they returned, when—

Lord Chief Justice TINDAL said that the judges found the question proposed to them couched in terms that made it appear doubtful whether it was confined to the strict legal construction of the acts of parliament therein mentioned, or whether it did not extend to that of a bill pending before the House; and therefore they declined to answer it.

MARSH and Others *v.* KEATING.

Wednesday, June 25th.

One F., a partner in the plaintiff's house, transferred certain stock out of the defendant's name in the books of the Bank of England, under a forged power of attorney, and without any authority from her, and caused the produce to be mixed with the money of the firm. F. having been convicted of another forgery committed under similar circumstances, and executed:—Held, that the defendant might recover the amount in an action against the surviving partners for money had and received to her use.

THIS action was brought, in pursuance of an order of the Lord Chancellor, for the purpose of trying the question whether the defendants below (the plaintiffs in error) and Henry Fauntleroy, deceased, were, at and before the date and issuing forth of the commissions of bankruptcy against them, and still are, indebted to the plaintiff below (the defendant in error) in any and what sum of money. By the order it was directed that an action should be brought by or in the name of Ann Keating against William Marsh, Josias Henry Stracey, and George Edward Graham, in his majesty's court of King's Bench, for money

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had and received by them to and for the use of the said Ann Keating; and that a special verdict should be taken in such action by consent, on a statement of facts to be settled in manner therein mentioned; and that the defendants in the said action should consent to judgment being entered up in the said court and in the court of error for the said plaintiff, for the purpose of the same being carried by writ of error before the House of Lords.

The question was, as to the right of Mrs. Keating to prove against the estate of Messrs. Marsh & Co. for a sum of money received by them on the sale of stock belonging to her, which stock was transferred by Henry Fauntleroy, one of the bankrupts, under a forged power of attorney.

By the special verdict it was found—That, on the 10th October, 1819, there was standing in the books of the governor and company of the Bank of England, in the name of the plaintiff, the sum of 12,000*l.* interest or share in the joint stock called Reduced Three per Cent. Annuities, transferrable at the said Bank of England. That the accounts of the proprietors of the said stock are kept in certain books of the governor and company of the Bank of England called

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house. That, on the 29th December, 1819, an entry was made in one of the transfer books of the governor and company of the Bank of England, purporting to be a transfer, under a power of attorney purporting to be granted by the plaintiff to the said William Marsh, Josias Henry Stracey, George Edward Graham, and Henry Fauntleroy, the persons who at the date thereof composed the firm of Marsh & Co., jointly, and each of them severally, of 9,000*l.* of the plaintiff's interest or share in the said stock, unto W. B. Tarbutt, of the Stock Exchange, gentleman, his executors, administrators, or assigns. That the power of attorney under which the said entry was made was not executed by the plaintiff, but that the signature to the said power of attorney purporting to be the signature of the plaintiff was forged by the said Henry Fauntleroy; that the said Henry Fauntleroy had not any authority from the plaintiff to make any such transfer; and that the plaintiff did not ever authorise or request the governor and company to make any transfer of the said sum of 9,000*l.* in the said stock, or any part thereof. That, in consequence of such entry in the transfer book, an entry was made in one of the ledgers of the governor and com-

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Fauntleroy, for forging letters of attorney for transfer of parts of the annuities transferable at the Bank of England; and that the said Henry Fauntleroy was tried an dconvicted upon one of such indictments upon the 30th of October, 1824, and executed on the 30th of November, in the same year; but that neither the plaintiff nor the said governor and company preferred any indictment against the said Henry Fauntleroy in respect of the forgery of the power of attorney hereinbefore referred to. That Marsh & Co. kept an account with Martin, Stone, & Co., bankers in the city of London, in the usual way of a banker's account; and that a pass-book went from one house to the other from time to time, according to the usual practice between bankers. That Marsh & Co. kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made; and that, in the due course of business the pass-book and the house-book of Marsh & Co. ought to have corresponded. That the house-book was in constant use in the banking-house of Marsh & Co.; and that the pass-book was frequently brought thither from the house of Martin & Co.; but that, when it was at the banking-house of Marsh & Co., the said

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That the said Henry Fauntleroy in general made up such daily balances in the said balancing-book; and the said sum of 6,013*l.* 2*s.* 6*d.* was not entered in the house-book, nor in the daily balancing-book, on the said 29th of December, 1819, or at any other time, nor did the same ever come into the yearly balances of the said house of Marsh & Co., or in any other manner into their books. That no individual partner of the house of Marsh & Co. could draw monies out of the said account of Martin, Stone, & Co., but by drafts signed in the partnership name or firm; but that the said Henry Fauntleroy paid in, and by means of such drafts drew out, large sums of money for his own individual purposes; and that the account between the said Marsh & Co. and Martin & Co. was repeatedly balanced between the said 29th of December, 1819, and the bankruptcy of Marsh & Co. That, on the 13th of September, 1824, in consequence of the discovery of the forgeries of the said Henry Fauntleroy, the said William Marsh, Josias Henry Stracey, and George Edward Graham, became bankrupts; and a commission of bankruptcy, bearing date the 16th of the same month, was duly awarded and issued against them, under which they were duly found and de-

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of April, 1820, up to the date of the said bankruptcy, entries were made in the books of Marsh & Co., by which the plaintiff's account was credited with a sum of money as the dividends on the Reduced Three per Cent. Annuities then in her name, including in such account the dividends on the said 9,000*l.* Reduced Three per Cent. Annuities, as if those dividends had been regularly received from time to time, such entries respecting the said dividends having likewise been made by the said Henry Fauntleroy or under his immediate directions; and that, until after the apprehension of the said Henry Fauntleroy before mentioned, the said William Marsh, Josias Henry Stracey, and George Edward Graham, and each of them, were wholly ignorant of the said forgery hereinbefore mentioned. That, after the said bankruptcy, the plaintiff made application to the governor and company of the Bank of England respecting the said sum of 9,000*l.* interest or share in the said stock called Reduced Three per Cent. Annuities; and that thereupon the following letter was written by the attornies of the governor and company of the Bank of England to the within named plaintiff:—

"New Bank Buildings, 4th December, 1824.

"The governors and directors of the Bank of England have had under their consideration your claim to have 9,000*l.* Reduced Three per Cent. Annuities, which formerly stood in your name, replaced. They find, upon inquiry, that the stock in question was sold and transferred in your name by one of the partners in the late firm of Marsh, Stracey, & Co., and that the produce of the said stock was paid into the funds of Marsh, Stracey, & Co. You have therefore, as the Bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof, under Marsh & Co.'s commission. And we are directed by the governor and directors to request that such proof may be tendered, and enforced by petition if it should not be ad-

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mitted by the commissioners; after which the Bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof: and the dividends on the stock so replaced which accrued subsequently to the latest period at which they were credited to you by Marsh, Stracey, & Co., will also be paid to you.

"We beg to add that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established.

"Mrs. Keating. "Freshfield & Kaye."

That, on the 1st August, 1825, the governor and company of the Bank of England paid the plaintiff the sum of 270*l.*, on her signing and entering into the following receipt and agreement:—

"August 1st, 1825. Received of the governor and company of the Bank of England the sum of 270*l.*, being the amount which would have been payable to me by way of dividend on 9,000*l.* Reduced Three per Cent. Annuities heretofore standing in my name, for the two half years ending the 10th day of October and the 5th day of April last, if that stock had not been transferred, as I allege it to have been, without any legal authority from me.

"I say received the same without prejudice to any

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present time, upon signing a receipt and undertaking, as set out ante, p. 14, with the following addition:—"And the said Ann Keating further admits that this claim is prosecuted by, and for the benefit, and at the expense of, the Bank of England; and that, whether the same shall fail or be established, she insists upon her demand against the Bank of England as above stated."

In Easter Term, 1832, judgment was entered up in the court of King's Bench, without argument, for the plaintiff; and a writ of error being thereupon brought into the court of Exchequer chamber, the judgment of the King's Bench was also, without argument, affirmed in that court; the object of the parties being to bring the matter in issue before the ultimate court of appeal without delay; and thereupon the defendants below accordingly brought their writ of error in parliament, and assigned general errors. The plaintiff below has joined in error.

The plaintiffs in error submitted that the judgment of the court of King's Bench, and the judgment of affirmance by the court of Exchequer Chamber, ought to be reversed—

First—Because Mrs. Keating, the defendant in error, was still the proprietor of the 9,000*l.* stock, and could not

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of the government or its agents is merely to conduct as instruments a transaction founded upon a legal and valid contract between the stockholder and any purchaser to whom he shall assign and transfer his right; but it is undeniable that Mrs. Keating, according to the truth of the case shewn by the special verdict, neither sold nor transferred, nor affirmed any act professing to be a sale and transfer of her stock, in consequence of which the pretended transfer in the books of the bank appears to have been made. No proposition can be more clear and certain than that a creditor, whether of the government or of an individual, cannot be deprived of his right to the debt, unless by some act to which he is, by himself or his agent, a party, or by the express provision of an act of parliament. If this be so, Mrs. Keating is still the proprietor of the stock, her claim is against the state, and her position is unaltered (*a*).

Secondly—Because, although it should be contended that Mrs. Keating may elect to affirm the act of transfer, by subsequent recognition, though originally done without her authority, yet no such affirmance has taken place. On the contrary, the special verdict finds that the act was done without her knowledge or consent, and that

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leroy, they would not have been liable any more than a banker into whose hands money obtained by felony or fraud had been paid in and afterwards drawn out by a customer in the usual course of business, would be liable to the party defrauded. In the transaction by which Fauntleroy became possessed of the money paid into Martin & Co.'s, he did not act as partner in the firm of Marsh & Co., nor for their benefit: it was a step in the conduct of the fraud and felony adopted for his own convenience. The money was not obtained on the authority of the partnership, nor in fact applied to its purposes. It was money which neither actually nor constructively was received to the use of Mrs. Keating. It is a mere fiction to treat this money as the money of Mrs. Keating. It is an additional fiction to imply a legal contract from circumstances inconsistent with the facts of the case. The money was obtained by a felonious act, and the innocent partners cannot, by implication of law, be made parties to the wrongful act. The facts of the case, as found by the special verdict, negative any tortious or beneficial receipt of this money by the firm of Marsh & Co., from which a legal liability to Mrs. Keating can be implied. Further, this is

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has not sustained any damage by the alleged transfer of the stock, for that the power of transferring stock is a power given by statute, and the exercise of such power is expressly restrained by the statute to one mode only, viz. "by entries in the transfer-books kept at the bank;" which entry, it is enacted, "shall be signed by the parties making such transfers, or their attornies authorized by writing under their hands and seal;" and that no other method of transferring stock shall be good. Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry in the transfer-book kept at the bank not having been signed by the party making the transfer, nor by any attorney authorised by writing under her hand and seal, it is contended that it is altogether inoperative, that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof; and the case of *Davis* v. *The Bank of England* (*d*) is cited and relied upon as an authority directly in point in support of such proposition. But we hold it to be altogether unnecessary on the present occasion to discuss the proposition above advanced, or the authority of the case cited in

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have been urged at your lordships' bar should be allowed to be available under the particular circumstances of this case. The general proposition, that, where a party who has been injured has different remedies against different persons, he may elect which of them he will pursue, is not called in question. If the goods of A. are wrongfully taken and sold, it is not disputed that the owners may bring trover against the wrong-doer, or may elect to consider him as his agent, may adopt the sale, and maintain an action for the price: but it is objected that such general rule will not apply to the present case, on various grounds of objection that have been advanced on the part of the defendants in the action. Those objections appear to resolve themselves substantially into four—first, it has been urged that, the transfer in this case being an act, not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party who has made it—secondly, that, at all events, in this case, such election is taken away, upon grounds of public policy; for that, the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would in effect be to affirm a sale completed through a

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penalty of the law before the action was brought; not, indeed, for the commission of this particular forgery, but of another of the same nature: and the present plaintiff having given to the bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the bar—*Dawkes* v. *Covenigh* (*e*) and *Crosley* v. *Long* (*f*). As to the argument, that, to affirm this sale is to affirm a felony, that point may be considered to have been decided in the case of *Stone* v. *Marsh* (*g*), with which decision we entirely concur. Lord Tenterden, in giving the judgment of the court of King's Bench, puts the question in so clear a point of view that it will be better to transcribe his words: "It was contended that the maxim of ratifying a precedent unauthorised act, and taking the benefit of it, cannot apply to a void or felonious act, and that here the plaintiffs were seeking to ratify the felonious act of Fauntleroy, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendant's argument. The assertion is incor-

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of the house; but, as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner, Fauntleroy, in the subsequent appropriation of the money, affords no answer after it has once been in their power; and, that it was so, appears to be distinctly stated in the special verdict. But it is urged that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the forgery, of the sale of the stock, or the payment of the produce of such sale into their account at Martin & Co.'s. It must be admitted that they were so far imposed upon by the acts of their partner as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money, and the source from which it was derived, if they had used the ordinary diligence of men of business. If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.

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20th June, in the tenth year of the reign of king Charles the First, to wit, at the parish of Lyme Regis, in the county of Dorset, our said late sovereign, by his certain letters patent, duly sealed in that behalf, after reciting as therein was recited, did, for himself, his heirs and successors (amongst other things), give, grant, and confirm unto the mayor and burgesses of Lyme Regis, and their successors, the borough or town of Lyme Regis, and also all that the building called the pier, quay, or cob of Lyme Regis, with all and singular the liberties, privileges, profits, franchises, and immunities to the same town, or to the said pier, quay, or cob, in any wise howsoever belonging or appertaining: to have, hold, and enjoy the aforesaid borough or town, and also all that the building aforesaid called the pier, quay, or cob of Lyme Regis, with all and singular the liberties, franchises, privileges, and immunities, to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, to the only and proper use and behoof of them the same mayor and burgesses of the borough aforesaid, and their succcessors, in fee farm for ever—yielding of fee farm to our sovereign late king Charles the First, his heirs and successors, of [illegible] for the aforesaid borough or town, with its liberties [illegible] said letters patent in that behalf [illegible] Charles the

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gesses of the borough aforesaid, and their successors, to the use of the aforesaid mayor and burgesses and their successors for ever, of the said late king Charles the First's gift, without account or any other thing for the same to our said late king Charles the First, his heirs or successors, in any wise howsoever to be rendered or paid, and to be levied by their own servants and ministers without estreats thereof to be sent to the Exchequer of our said late king Charles the First: And moreover, of his more ample and special grace, and of his certain knowledge and mere motion, our said late king Charles the First did will, and by the said letters patent did, for himself, his heirs and successors, give and grant to the said mayor and burgesses of the borough aforesaid, and their successors, full power, authority, and license from time to time for ever to dig stones and rocks in any places whatsoever within the borough and parish of the town aforesaid, out of the sea, and on the sea shore, in the borough and parish aforesaid adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid called the pier, quay, or cob, and other necessary reparations and common works of the same town

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aforesaid, or either or any of them, by reason of the premises, or either or any of them, should be thereof hindered, molested, aggrieved, or in any thing disturbed by him the said late king Charles the First, or by his heirs, or his or their justices, sheriffs, escheators, or other the bailiffs or ministers of the said late king Charles the First, his heirs or successors whomsoever: Which said letters patent the mayor and burgesses of the borough aforesaid afterwards, to wit, on the same day aforesaid, to wit, at Lyme Regis aforesaid, in the county aforesaid, duly accepted; and the same thence hitherto have been and still are one of the governing charters of the said borough, to wit, at Lyme Regis aforesaid: And the plaintiff further said that the said mayor and burgesses from the time of their acceptance of the said letters patent hitherto have had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by such letters patent as aforesaid, to wit, at Lyme Regis aforesaid, in the county aforesaid; that, before and at the time of the committing of the grievances by the defendants as thereinafter next mentioned, the plaintiff was lawfully possessed of and in divers, to wit, five messuages, five cottages, five buildings, and divers, to wit, twenty closes of land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough of Lyme Regis, aforesaid; that, before and at the time of the committing of the grievances by the defendants as thereinafter next mentioned, divers, to wit, five other messuages, five other cottages, five other buildings, and divers, to wit, twenty closes of other land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough of Lyme Regis aforesaid, were in the possession and occupation of divers persons as tenants thereof respectively to the plaintiff, the reversion thereof then and still belonging to the plaintiff, to wit, at the borough of Lyme Regis aforesaid in the county aforesaid: all which such several messuages, cottages, buildings, and

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closes of land, with the appurtenances, before and at the times of the committing of the several grievances by the defendants as thereinafter next mentioned, were abutting on or near the sea shore there, to wit, at the borough aforesaid, in the county aforesaid; that, before and at the time of the sealing of the said letters patent, and the acceptance thereof as aforesaid by the said mayor and burgesses, and also at the time of the committing of the several grievances by the defendants as thereinafter next mentioned, divers, to wit, ten buildings, ten banks, ten sea shores, and ten mounds had been and were then respectively standing and being within the borough of Lyme Regis aforesaid, and divers, to wit, ten other buildings, ten other banks, ten other sea shores, and ten other mounds, had been and respectively were belonging and appertaining to the said borough, and divers, to wit, ten other buildings, ten other banks, ten other sea shores, and ten other mounds had been and were at those times respectively standing and being and situate between the said borough and the sea, to wit, in the borough aforesaid, in the county aforesaid; all which buildings, banks, and sea-shores and mounds respectively at the times of the committing of

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ught at their own proper costs and charges well and
iently to repair, maintain, and support, when and so
as it should or might have been or shall or may be
sary or expedient so to do, so as to prevent damage
ury to the said messuages, cottages, buildings, and
of the plaintiff, by the sea or the waves or waters
of, to wit, at the borough aforesaid in the county
aid: Yet the defendants, well knowing the pre-
, and not regarding the said letters patent, or their
n that behalf, but contriving and wrongfully and un-
intending to injure, prejudice, and aggrieve the
iff, and to deprive him of the use and benefit of his
l messuages, cottages, buildings, and closes first
mentioned, and also to injure, prejudice, and ag-
him the plaintiff in his reversionary interest of and
e said messuages, cottages, buildings, and closes
dly above mentioned, so being in the possession and
ation of the said persons as tenants thereof to him
laintiff as aforesaid, in which he the plaintiff was so
sted as aforesaid, theretofore, to wit, on the 1st
ary, 1821, and from thence for a long space of time,
, continually until the commencement of this suit, to
it the borough aforesaid, in the county aforesaid,
rfully and unjustly suffered and permitted the said
ings, banks, sea shores, and mounds to be and con-
, and the same during all the time aforesaid were

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sea and the waves and waters thereof aforesaid, to wit, on the said 1st January, 1821, and on divers other days and times between that day and the commencement of the suit, to wit, at the borough aforesaid, in the county aforesaid, ran and flowed with great force and violence in, upon, under, over, and against the said several messuages, cottages, buildings, and closes of the plaintiff, and in which he was so interested as aforesaid, and thereby then and there greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said several messuages, cottages, and buildings, and the materials of the said messuages, cottages, and buildings, together with divers, to wit, ten thousand cart loads of the earth and soil, and divers, to wit, five acres of the said several closes, were washed and carried away, to wit, at the borough aforesaid, in the county aforesaid: By means of which said several premises, the plaintiff not only lost and was deprived of the use, benefit, and enjoyment of his said messuages, cottages, buildings, and closes in that count first above mentioned, but was also thereby then and there greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in

ever, when it was necessary or expedient, repair at their own costs all the buildings, banks, sea shores, and other mounds to the borough belonging or appertaining, or situate between the borough and the sea; which said last-mentioned letters patent the defendant afterwards, to wit, on the said 20th June, at the borough aforesaid, in the county aforesaid, duly accepted; that the plaintiff, before and at the time of the committing of the grievances by the defendants as thereinafter mentioned, was lawfully possessed of divers, to wit, five other messuages, &c., [as in the first count]; that, before and at the time of the sealing of the said letters patent and the acceptance thereof by the said mayor and burgesses, divers, to wit, ten buildings, ten banks, &c., had been and were respectively standing and being within and belonging and appertaining to the said borough, and all which buildings, banks, &c., constituted and formed and were a protection and safe-guard to the messuages, &c., of the plaintiff, and hindered and prevented, and still of right ought to hinder and prevent the sea, &c., from running or flowing on or over the said several messuages, &c., and all which buildings, banks, &c., the defendants, at the time of the committing of the several grievances by them as thereinafter next mentioned, were, under and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof as aforesaid, liable to, and ought at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable and ought at their own proper costs and charges well and sufficiently to repair when and so often as it should or might be necessary or expedient so to do. Breach—that the defendants suffered and permitted the buildings, banks, &c., to be ruinous and out of repair, as in the first count.

The third and fourth counts charged the defendants as being liable to repair the banks, &c., by prescription; and the fifth, ratione tenuræ. The defendants pleaded the general issue.

At the trial before Mr. Justice Littledale at the Spring

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Assizes at Dorchester in the year 1828, a verdict was entered for the plaintiff on the first and second counts of the declaration, and the jury were, by consent, discharged as to the others. In Trinity Term, 1829, the court of Common Pleas, on the application of the plaintiff below, ordered the postea to be amended, by entering the verdict on the first count only (*a*). A motion was made in that court in Easter Term, 1828, to arrest the judgment, which rule was in the following Trinity Term, discharged (*b*), the court of Common Pleas holding that the grant being made to the corporation expressly for the benefit of the public, the moment they accepted the charter they took upon themselves the responsibility of discharging those duties to the public which it was expressly declared they were to discharge at the time they accepted the borough; and that they were liable to be sued for an injury resulting from their neglect of this duty.

The defendants below thereupon brought a writ of error in the King's Bench, which came on for argument in Hilary Term, 1831; and in Michaelmas Term in that year that court affirmed the judgment of the court of Common Pleas (*c*). Lord Tenterden, in delivering the judg-

But we think the obligation to repair the banks and sea-shores is one which concerns the public, in consequence of which an indictment might have been maintained against the plaintiffs in error (the defendants below) for their general default; from whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual, as in the ordinary case of nuisance in a highway by a stranger digging a trench, &c., or by the act or default of a third person bound to repair ratione tenuræ. An indictment may be sustained for the general injury to the public, and an action on the case for a special and particular injury to an individual."

A writ of error was thereupon brought in the House of Lords.

The plaintiffs in error contended that the judgments of the courts below ought to be reversed, on the following grounds:—

First—No liability by reason of tenure was created by the charter of Charles the First, nor is any alleged in pleading (*f*).

Secondly—There is no authority for the liability here claimed; the cases cited by the court of King's Bench in giving judgment in this case relating to liabilities by reason of prescription (*g*), or of tenure (*h*), or of acts of parliament (*i*), or of nuisances to public rights (*k*); and not to any liability arising from an acceptance of a grant from the king.

Thirdly—The remedies for the non-performance of such repairs as are directed by the charter of Charles the First, are pointed out by the act of 43 Eliz. c. 4, and by

(*f*) Rex. *v.* Kerrison, 1 Mau. & Selw. 435.

(*g*) Paine *v.* Partrick, Carth. 191. S.C. Payne *v.* Partridge, Show. 255.

(*h*) 12 Hen. 7, fol. 18.

(*i*) Rex *v.* The Inhabitants of Kent, 13 East, 220. Rex *v.* The Inhabitants of Lindsay, 14 East, 317. Rex *v.* Kerrison, 3 Mau. & Selw. 526.

(*k*) Rex *v.* Stoughton, 2 Saund. 157.

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numerous authorities, to be either a suit in the court of Chancery to compel a proper application of the funds granted, or a proceeding on the part of the king, for a forfeiture of the franchise (*l*).

Fourthly—The occupiers of lands abutting on the sea are primarily liable to protect them from the sea; and the liability of the plaintiffs in error to protect the defendant in error from the sea, if any such exists, arises from the agreement implied from their acceptance of the charter of Charles the First. But no agreement to become liable to do that for which others are primarily liable will subject a party to an indictment, though the party be a corporation aggregate, and though a sufficient consideration for the agreement be shewn, and though the public interest is concerned (*m*): nor will such agreement release those in whom such primary liability exists (*n*). The liability of the plaintiffs in error to an indictment for non-performance of the repairs in question is assumed in the judgment of the Court of King's Bench, as the ground on which the right of action for special damage rests.

Fifthly—It appears by the statute 1 Geo. 4, c. 99, for improving and maintaining the harbour, pier, or cob at the

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For the defendant in error it was submitted that the udgments of the courts below ought to be affirmed, for he following reasons:—It is a general principle of law, hat every breach of public duty, or neglect of what the arty is bound to perform, working wrong or loss to anther, is injurious and actionable (*o*). On this principle is ounded the right of action against sheriffs, justices, con-:ables, &c.; against a keeper of records (*p*); against a :rryman for neglecting to keep his boat (*q*); and against corporation for not repairing a creek of the sea (*r*). By ıe charter granted to the plaintiffs in error, the king *wills* hat they shall repair the sea walls: they accept the char-er: and by their acceptance the words of the king enure s a covenant by the plaintiffs in error (*s*). They neglect heir duty, by which the defendant in error sustains a se-ious loss; and this gives him a right of action against hem. The duty imposed affects the public interest, and :he charter is therefore granted in exercise of the royal prerogative, and is not like the indenture of subjects. The plaintiffs in error are also liable by reason of their tenure of the town or borough (*t*). They are also liable by reason of their possession of the walls themselves (*u*). The declaration sufficiently alleges both these liabilities, and does not aver an obligation more extensive than the duty required by the charter.

The following question was proposed by their lordships for the opinion of the judges:—

"The declaration in an action on the case against a

(*o*) Sutton *v.* Johnstone, 1 Term Rep. 493. Russel *v.* The Men of Devon, 2 Term Rep. 667.

(*p*) Herbert *v.* Paget, 1 Lev. 64.

(*q*) Payne *v.* Partridge, Show. 255, S.C. Paine *v.* Partrick, Carth. 191. Churchman *v.* Tunstal, Hardres, 162.

(*r*) The Mayor of Lynn *v.* Turner, Cowp. 86.

(*s*) Bret's case, Cro. Jac. 399.

(*t*) Callis on Sewers, 117.

(*u*) Callis on Sewers, 115.

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corporation states, that, before the committing of the grievances by the defendants, the king, by his letters patent duly sealed, did give, grant, and confirm to the corporation and their successors the borough or town of Lyme Regis, also all that building called the pier, quay, or cob of Lyme Regis, with the liberties, franchises, privileges, and immunities to the same town, pier, quay, or cob in any wise belonging, to the only proper use and behoof of the corporation, in fee farm for ever, yielding of fee farm to the king as in the letters patent mentioned; and that the king thereby released to the corporation part of an antient farm of a sum of money due from them annually, willing that the corporation should be thereof acquitted, and that the corporation and their successors all and singular of the buildings, banks, sea shores, and all other mounds and ditches within the said borough or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier, quay, or cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain, and support as often as it should be necessary or expedient; that the

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state that the plaintiff was, at the time of the committing of the grievances, lawfully possessed of a messuage and land in the county aforesaid, to wit, in the said borough, which were before and at those times abutting on or near the sea shore; that a building, bank, or sea shore within the borough, a building, bank, or sea shore belonging and appertaining to the borough, and a building, bank, or sea shore situate between the borough and the sea, all of which were there at the time of the sealing and acceptance of the said letters patent and at the time of the committing of the grivances, and at the last-mentioned time were near to and constituted and formed and were a protection and safeguard, and still of right ought to be so, to the plaintiff's messuage and land aforesaid, and then hindered the sea from flowing upon and over that messuage and land, and which buildings, banks, sea shores, and mounds the defendants were at those times, by virtue of the said letters patent and acceptance, liable to repair at their own proper costs and charges as often as it might be necessary or expedient to do so. A breach is then assigned, that the corporation wrongfully permitted the said buildings, banks, sea shores, and mounds to be out of repair, for want of due, proper, and necessary repairing of the same, by means of which the plaintiff's house and land were inundated and injured—

"After a verdict upon a plea of not guilty, is this declaration good, and does it disclose a sufficient cause of action by the plaintiff against the corporation?

Mr. Justice Park now delivered the opinion of the judges:—

In order to make this declaration good, it must appear —first, that the corporation are under a legal obligation to repair the place in question—secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-re-

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pair—thirdly, that the place in question is out of repair—lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the king's subjects by such want of repair.

The third and last requisites are admitted to be averred in this declaration, and with sufficient words, at least after verdict. The doubt in the case arises upon the first and second requisites. With regard to the first, it is argued that the corporation have not by acceptance of the charter stated in the declaration incurred any legal obligation whatever as to the repair of the place in question; that the charter does not contain a grant on condition that the corporation shall repair, but merely an expression of the king's will that they shall repair. Looking at the words of the charter, as stated in this declaration, we are of opinion that it does cast upon the corporation an obligation to repair, which they by accepting the charter have adopted. The king grants and confirms to the corporation the town or borough and pier, with the liberties, franchises, privileges, and immunities to the same belonging, in fee farm for ever, yielding of fee farm to the king as therein mentioned; and the king remits part of an antient

trary, they shew the consideration for the grant, the motive inducing the king to grant, and consequently the terms and conditions on which the grant was to be accepted. What effect such words might have in a grant from one subject to another, it is not necessary to determine. Such a grant between subjects is matter of contract and bargain, strictly so speaking: but a grant from the king to a subject is matter of favour, and the language used will be found to vary accordingly. Independently of authorities, we should have come to this conclusion; but the case of *Bret* v. *Cumberland* (*x*) seems to us to be decisive of the question. That was an action of covenant by the assignee of King James the First against the executors of the lessee of a mill under letters patent of Queen Elizabeth, sealed with her seal only, and containing these words: "Et prædictus Willielmus, executores et assignati sui, prædictum molendinum et domus et ædificia sufficienter reparabunt." The first question was, whether these words in the letters patent, to which the queen's seal was affixed, shall enure as a covenant to bind the lessee and his assigns: and it was resolved "that it should, for the lessee takes thereby, because it is matter of record: although in show they are the words of the lessor only, yet, he accepting thereof and enjoying it, it is as well his covenant in fact, and shall bind him as strongly as if it had been a covenant by indenture." So, in the charter in question, the words are in show the words of the king only; but, the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

The second requisite is in truth that upon which the case wholly turns—viz. that the obligation must be matter of so general and public concern that an indictment will lie

(*x*) Cro. Jac. 521.

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for the breach of it. Now, this depends principally upon the construction which ought to be put upon the words of the charter. They are undoubtedly of a very general nature—"All and singular the buildings, banks, sea shores, and all other mounds and ditches within the said borough or to the said borough belonging, or situate between the said borough and the sea." It is asked, do these words embrace every little ditch or bank within the limits of the borough, whether public or private; and, if not, where is the limit? The answer is, that they embrace only such buildings, banks, sea shores, mounds, and ditches within or belonging to the borough, or situate between the borough and the sea, as form part of the defences and safeguard of the borough against the incroachments of the sea. This may be gathered from the context, from the words "sea shores," from the expression "situate between the borough and the sea," and from the obvious intention and scope of the charter, as stated in the declaration. It seems to us that such construction and limitation of the words is necessary in order to give this part of the charter any meaning, and that no violence is done, either to the grammatical or reasonable sense of the words by such con-

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is said that, even if the repair of the sea defences of a town or borough be matter of general and public concern, yet that the declaration in this case does not shew that the particular "buildings, banks, sea shores, mounds, or ditches," alleged to be out of repair, are part of the sea defences of the borough, nor is it expressly averred that the public had any interest in them. The answer is, that the buildings, banks, sea shores, mounds or ditches in question, are described in the declaration in the very words used in the charter, as set out in the declaration, and are expressly averred to have been in existence at the time when the charter was granted and accepted; and it is also expressly averred that the corporation were liable under the charter to repair them. Now, these words in the averments of the declaration must be understood in the same sense as the same words in the charter; and, as we are of opinion that the true construction of them in the charter is, to understand them as limited to the sea defences of the borough, so we think they are to be taken to have the same meaning in the declaration, and to have the same effect as if the buildings, banks, sea shores, mounds, or ditches in question were expressly averred to be part of the defences and safeguards of the borough and town against the incroachments of the sea. And this opinion is further strengthened by the circumstance that the present objection arises after verdict. The effect of a verdict in curing defects in the pleadings at common law, is stated correctly in one of the last cases on the subject, viz. that of *Jackson* v. *Pesked* (*y*). Lord Ellenborough there said: "Where a matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating the matter in express terms in a declaration,

(*y*) 1 Mau. & Selw. 234.

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provided that it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by verdict; and, where a general allegation must, in fair construction, so far require to be restricted that no Judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict that it was so restrained at the trial; but, unless the allegation is of such a nature that it would have been doing violence to the terms, as applied to the subject matter, to have treated it as unrestrained, we are not aware of any authority which will warrant us in presuming that it was considered as restrained merely because, in the extreme latitude of the terms, such a sense might be affixed to them." Here, we think that the allegations of the declaration, as applied to the subject matter, do by reasonable intendment shew that the buildings, banks, mounds, and ditches in question were part of the defences and safeguards of the town and borough against the incroachments of the sea, and particularly of that part of the town and borough in which the plaintiff's property is situated. The declaration therefore shews a charter casting an obligation on the corporation to do repairs of general and public concern, and avers that they have omitted to do such repairs, and that the plaintiff has thereby sustained special damage. It is not indeed shewn that the plaintiff's [illegible] the time when the charter was granted; [illegible] if the obligation to re- [illegible]

and maintain an action. It is admitted, that, if their liability arose by prescription, they would be indictable, and also that an action would lie for special damage, as in *The Mayor, &c., of Lynn* v. *Turner* (*z*), *Churchman* v. *Tunstal* (*a*), *Payne* v. *Partridge* (*b*), and many other authorities, which it is unnecessary to cite, because it is clear and undoubted law, that, wherever an indictment lies for nonrepair, an action on the case will lie at the suit of a party sustaining any peculiar damage. Now, we are unable to see any sound distinction between a liability by prescription, and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant; but it necessarily implies some legal origin; and charter would be a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shewn, would that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted, than it is now, after a great lapse of time? Certainly not. If the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A. and B., nor even of a charter granted by the king, where no matter of general and public concern is involved: but, where that is the case, and the king, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action. If it were otherwise, many inconveniences would follow: among them, in the case in question, is this—that, as the duty and the right to repair the sea defences of the town and borough

(*z*) Cowp. 86. (*a*) Hardres, 162. (*b*) Show. 255, Carth. 191.

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is cast upon the corporation, no other person would be justified in interfering and doing repairs, however necessary; or at all events not until the corporation had been called upon and neglected to do them—*The Earl of Lonsdale* v. *Nelson* (c): and it is doubtful whether he would be justified even then; the proper remedy being, as there stated, by indictment or action; for, nuisances of omission cannot in general be abated.

Two of the judges have entertained considerable doubts whether the declaration contains sufficient words in this case to shew that the mounds or banks were of such public benefit as that an indictment would lie for not repairing them; but, agreeing in the general view of the law, they, as well as the rest of the judges who heard the argument, are of opinion that the question proposed by your lordships must be answered in the affirmative, and that the declaration is sufficient.

Judgment affirmed.

(c) 2 Barn. & Cress. 302, 3 Dow. & Ryl. 556.

In the Common Pleas.

MICHAELMAS TERM, 5 WILL. IV.

1834.

Tuesday, Nov. 4th.

The court refused to discharge a defendant out of custody on the ground of *trifling* defects in the process on which he had been arrested.

Pocock *v.* Mason.

Mr. R. V. Richards moved that the defendant in this cause might be discharged out of custody, on the ground of a variance between the writ and the copy delivered to him on his arrest. The alleged variance was, that, in the direction at the end of the writ—' and we do further command you the said sheriff, that, immediately after [the] execution hereof, you do return this writ to our said court, &c.; or that, if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner if you shall be thereto required by order of the said court, or [by] any judge thereof'—the words between brackets were omitted from the copy.—He submitted that, although the courts might be disposed to allow some degree of latitude in the compliance with their own rules, it was contrary to their practice to do so where a form prescribed by an act of parliament had been departed from.

Per Curiam.—The defendant has been served with that which is in substance a true copy of the process. The omissions are too trivial to constitute a variance.

Refused (*a*).

(*a*) Where the discrepancy, however slight literally speaking, is such as to alter the sense, it will be fatal—Nicoll *v.* Boyne, ante, Vol. 3, p. 812. And see Roberts *v.* Wedderburne, ante, Vol. 4, p. 488.

1834.

Thursday, Nov. 6th.

Service of a declaration in ejectment on the bailiff of the tenant is sufficient foundation for judgment against the casual ejector, where it appears to have duly come to the hands of the tenant's attorney, who promises to appear.

TENNY *d.* MILLS *v.* CUTTS.

MR. Serjeant *Wilde* moved for judgment against the casual ejector or an affidavit alleging a service of the declaration and notice upon the bailiff of the tenant in possesion upon the premises, the purport thereof being duly explained to him; and that the declaration and notice had before the commencement of the present term come to the hands of the tenant's attorney, who stated that he would appear for him.

PER CURIAM.—That looks like an implied admission that the documents had come to the hands of the tenant.

Rule granted (*a*).

(*a*) *See Doe* d. *Walker* v. *Roe*, 2 Cromp. & Jervis, 381.

Thursday, Nov. 6th.

The affidavit verifying the certificate of the

ANONYMOUS.

THE 83rd section of the statute 3 & 4 Will. 4, c. 74, enacts, "that, in those cases where, by reason of residence

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ANONYMOUS.

A commission had been issued under the above section for taking the acknowledgment of a lady resident in Ireland. By reason of the absence of an affidavit verifying the certificate of acknowledgment, as required by the rule of Hilary Term, 4 Will. 4, the certificate was not filed before the day on which the commission had been made returnable.

Mr. Serjeant *Coleridge* moved that it might now be filed.

Lord Chief Justice TINDAL.—I see no difficulty in the affidavit verifying the certificate being filed subsequently to the time of filing the certificate.

Mr. Justice GASELEE.—I doubt whether the rule (*a*) as to filing the certificate applies to the case of a special commission.

Granted.

(*a*) Reg. Gen. Hilary Term, 4 Will. 4, s. 7, by which it is ordered "that the certificates and affidavits verifying the same shall, within one month from the taking the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the court or a judge."

By the 85th section of the statute, it is enacted "that every certificate of the taking of an acknowledgment by a married woman of any deed, together with an affivit by some person verifying the same and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the court of Commons Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed either by some judge or master in Chancery or by two commissioners appointed pursuant to that act, and duly verified by affidavit as aforesaid; and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and, if all the requisites in that act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said court of Common Pleas."

As to the party by whom the affidavit is to be made, see the 4th section of the rules of Hilary, 4 Will. 4, and the form there given, ante, Vol. 4, pp. 115, et seq.

1834.

Thursday, Nov. 6th.

Though by the 4 & 5 Will. 4, c. 62, s. 26, where a cause is tried in the Common Pleas at Lancaster, the motion for a new trial, &c., is directed to be made in *any one* of the courts at Westminster, yet the courts require it to be made in the court of which the judge who presided at the trial is a member.

FORSTER *v.* JOLLIFFE.

THIS was an action tried at the last Assizes before Mr. Baron Gurney in the court of Common Pleas at Lancaster. By the 26th section of the statute 4 & 5 Will. 4, c. 62, it is enacted "that it shall be lawful for any party in in any action now depending, or hereafter to be depending in the said court of Common Pleas at Lancaster, to apply to *any one* of the superior courts at Westminster sitting in banco within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in the said superior court, for a rule to shew cause why a new trial should not be granted or nonsuit set aside, and a new trial had, or a verdict entered for the plaintiff or defendant, or a nonsuit entered, as the case may be, in such action; which court is hereby authorised and empowered to grant or refuse such rule, and afterwards to proceed to hear and determine the merits thereof, and to make such orders thereupon as the same court shall think proper, &c., &c."

Mr. *Wightman* moved for a new trial: but—

[redacted]

1834.

Thursday, Nov. 6th.

By one lease two parcels were demised for different terms, and at distinct rents, with covenants in some cases applicable to both, and in others to one only of the parcels:—Held, that one ad valorem stamp on the aggregate rent was sufficient.

BLOUNT *v.* PEARMAN.

THIS was an action of debt upon a demise. At the trial before Mr. Baron Williams, at the last Assizes at Oxford, it was objected, on the part of the defendant, that the deed produced in support of the plaintiff's claim was improperly stamped, and therefore not admissible. It was a lease by which the plaintiff demised to the defendant two separate properties for two distinct terms; the covenants in the lease applying, some to the one and some to the other exclusively, and some to both parcels—a separate rent being payable in respect of each. The stamp was imposed as the aggregate of the two rents—*3l.*: whereas, it was contended, there should have been a separate stamp upon each, in which case the duty would have been 4*l.*

A verdict having been found for the plaintiff—

Mr. Serjeant *Ludlow*, in pursuance of leave, now moved to enter a nonsuit on this ground, and for a nonsuit or a new trial on other objections.—[Lord Chief Justice *Tindal* referred to *Boase* v. *Jackson* (*a*), where the plaintiff demised a slate pit at S. and stone quarries at M. to the defendant under one indenture of lease, to hold the one from Lady-day, 1815, and the others from Michaelmas, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit, and 130*l.* for the quarries: it was held that one ad valorem stamp on the aggregate amount of the two rents was sufficient, as the letting must be considered as one transaction, and there being no evidence of an intent by the parties to defraud the revenue.] The authority of that case has been at least very much shaken by *Coster* v.

(*a*) 6 J. B. Moore, 480, 3 Brod. & Bing. 185.

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BLOUNT v. PEARMAN.

Cowling (*b*), and by the observations of Mr. Jarman, in the 4th volume of Bythewood's Conveyancing, p. 402. In *Coster* v. *Cowling*, a house and lands were demised by lease for a term of years at the yearly rent of 370*l.*, and there was a separate reservation of 50*l.* per annum for the use of the fixtures; and it was held that the lease required a stamp on the aggregate of the two rents, the fixtures and furniture being accessory to the house and lands; otherwise an additional stamp would have been requisite for the second rent. In this case there are two several contracts—two distinct subject-matters of demise, and two distinct terms. In *Roots* v. *Lord Dormer* (*c*) it was held, that, where several lots are knocked down to a bidder at an auction of growing crops, and his name marked against them in the catalogue, a distinct contract arises for each lot; and therefore a memorandum signed afterwards by the bidder, stating that he agrees to become the purchaser of the several lots set against his name, does not require a stamp, though the aggregate exceed 20*l.* in value, no single lot being of that price.

Lord Chief Justice TINDAL.—I am unable to see with sufficient certainty that the case of *Boase* v. *Jackson* was wrongly decided, or sufficiently to distinguish this case from that, to be induced to grant a rule for a nonsuit on [illegible] of the insufficiency of the stamp in question. [illegible] one transaction; the de- [illegible] one

periods of the year—the arable land at one period, and the pasture at another: the habendum in such case is always similar to this. It seems to me, therefore, that, unless it appears that the parties intended to defraud the revenue by entering on one skin of parchment two different contracts, we ought not to interfere, on the authority of *Boase* v. *Jackson*.

Mr. Justice GASELEE.—No decided case has ever impugned the authority of that of *Boase* v. *Jackson*.

The rest of the Court concurring—

Rule refused (*d*).

(*d*) The rule was granted on the other points.

MOSTYN *v.* CHAMPNEYS.

Friday, Nov. 7th.

The court will not under any circumstances dispense with the signature of counsel to a special case.

Neither will the court grant a rule calling upon an attorney to shew cause why he refuses to obtain such signature to a case settled by a master in Chancery in pursuance of an order of the Vice-Chancellor.

BY an order of the Vice-Chancellor, a case was directed to be stated for the opinion of this court; the order providing, that, in the event of the counsel for the respective parties not agreeing upon the facts to be inserted therein, the case should be settled by a master in Chancery. The counsel did disagree, and the case was accordingly settled by a master, and certified by him. The secondary declining to set the case down in the paper for argument, it not being signed by counsel—

Sir *Gregory Lewin*, on the ground that the attorney for one of the parties, being dissatisfied with the statement of facts therein, refused to obtain the signature of counsel to the case, prayed the court to permit it to be set down for argument on the master's certificate, or to grant a rule calling upon the attorney to shew cause why he refused

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to get the case signed, such refusal amounting (as he contended) to a cnotempt.

Lord Chief Justice TINDAL.—I do not see how we can permit a case to be argued without having the signatures of the counsel who are prepared to argue it. Their signing it is a voucher that the case is one fit for argument; and it is the only security the court has that they hold themselves bound by the statements of fact contained therein. The certificate of the master amounts to nothing. Neither do I think we have any power to grant a rule against the attorney. The disobedience of the order of the Vice-Chancellor is no contempt of this court: we have no cause before us; and, until it is regularly presented to us, we can know nothing of the matter. The contempt, if any, is of another court.

The rest of the Court concurring—

Sir Gregory took nothing.

BAKER and MARY his Wife, Executrix of JOHN HUTCHINS, Deceased, *v.* GOSTLING.

Friday, Nov. 7th,

THIS was an action of covenant brought by the plaintiffs [illegible] the defendant arrears of rent reserved [illegible] plaintiffs declared upon this [illegible] ante, Vol.

ment of the rent, the testator having *no reversion* in the premises—thirdly, that the said John Hutchins did not by the said supposed indenture in the declaration mentioned, or otherwise, assign unto him the defendant, his executors and administrators, and also to his assigns to be licensed as thereinafter mentioned, the said messuage, dwelling-house, and tenement in the said declaration mentioned, except as therein is excepted, to have and to hold the said messuage and premises and every part thereof, except as aforesaid, unto the defendant, his executors, administrators, and assigns to be licensed as thereinafter mentioned, from the 29th September then last past, for and during the residue and remainder then to come and unexpired of the said term of thirty-one years, commencing from the said 25th day of December, in the year 1823, in manner and form as the plaintiffs had in that behalf alleged. And this, &c. Issue thereon.

The plaintiffs joined issue on the first and third pleas, and demurred to the second. The court, on the argument of the demurrer, held, that, notwithstanding the instrument might amount to an assignment, inasmuch as all the lessee's term was thereby conveyed, covenant lay at the suit of the personal representatives of the lessee, to recover arrears of the rent reserved, accruing during the continuance of the lessee's term.

At the trial before Mr. Justice Vaughan, at the Sittings at Westminster in the last term, the plaintiffs in support of their case gave in evidence the original lease of the premises in question, granted by Sir Richard Sutton to the testator, whereby it appeared that they were granted to the latter for the term of thirty-one years, commencing at Christmas, 1823, at the yearly rent of 35*l.* They then offered in evidence a deed, executed by the defendant only, purporting to be the counterpart of a demise by the testator to the defendant of the premises held by the former under the lease from Sir Richard Sutton, for the term

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of thirty years from the 29th September, 1825—being a period longer by three quarters of a year than the duration of his own interest therein. The consideration for the grant was stated to be "the sum of 100*l.* by the defendant to the said John Hutchins in hand paid," and also "the yearly sum of money (75*l.*), covenants, and agreements thereinafter mentioned and contained by and on the part and behalf of the defendant, his executors, administrators, and assigns to be paid, kept, done, and performed;" and, the instrument being stamped with a thirty shilling stamp only, it was objected on the part of the defendant that it could not be received, for that, though the stamp impressed upon it would have been the proper stamp if the deed were taken to be a lease, yet the issue in pooof of the affirmative of which it was offered being whether or not the premises therein mentioned had been assigned to the defendant, it could not be admitted as evidence of an assignment without a proper stamp, viz. 1*l.* 15*s.*

A verdict having been found for the plaintiffs—

Mr. Serjeant *Coleridge* obtained a rule nisi to enter a

[redacted]

:y, real or personal, heritable or moveable, or of any :ight, title, interest, or claim in, to, out of, or upon any ands, tenements, rents, annuities or other property, that s to say, for and in respect of the principal or only deed, nstrument, or writing whereby the lands or other things ıold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in :he purchaser or purchasers, or any other person or persons by his, her, or their direction—where the purchase ɔr consideration money therein or thereupon expressed shall amount to 50*l.*, and not amount to 150*l.*"—is 1*l.* 10*s.* Therefore, if this instrument be for all purposes an assignment, still the stamp it bears is sufficient. [Lord Chief Justice *Tindal.*—The instrument in question was produced at the trial, not as being an assignment (it not being signed by the assignor), but as a note in writing under the seal of the testator, admitting that he held under an assignment such as that therein purported to be set out.] If this be the counterpart of an assignment (as there is no reason in law why there may not be), a counterpart stamp is sufficient. It will be contended on the other side that the deed ranges itself under the general clause in the schedule —" Deed of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp duty "—by which a duty of 1*l.* 15*s.* is imposed: but that must be intended to apply to deeds not amounting to a conveyance or grant of an interest in lands, &c. But, although for the purposes of pleading, the instrument in question is necessarily treated as an assignment; still it ought only to be charged, according to the intention of the parties, as a lease: for, the stamp act does not look to the technical effect of the instrument when it comes to be set forth in pleading. In *Doe* d. *Kettle* v. *Lewis*, (*a*) it was held that the stamp required by 55 Geo. 3, c. 184,

(*a*) 10 Barn. & Cress, 673.

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for a lease, is regulated by the consideration (whether fine or rent) *expressed* to be paid, and not that which is actually paid. And in *Boase* v. *Jackson* (*b*), where the plaintiff demised a slate pit at S. and stone quarries at M. to the defendant under one indenture of lease, to hold the one from Lady-Day, 1815, and the others from Michaelmas, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit, and 130*l.* for the stone quarries—it was held that one ad valorem stamp on the aggregate amount was sufficient, as the letting must be considered as one transaction, and there being no evidence of an intent by the parties to defraud the revenue. Here, there was no fraud; but, by mere operation of law, the deed bears a character different from that which it in fact has, or the parties intended.

To shew that the stamp act is to be expounded liberally, the following cases were referred to:—*Burleigh* v. *Stibbs* (*c*), *Robinson* v. *Macdônnel* (*d*), *Duck* v. *Braddyl* (*e*), *Fall* v. *Meek* (*f*), *Blandy* v. *Herbert* (*g*), and *Price* v. *Thomas* (*h*).

[redacted]

ment made to Gostling: in either case, it is a deed not otherwise charged in the schedule to the stamp act, nor expressly exempted from all stamp duty; and therefore liable to be charged with a duty of 1*l.* 15*s.* The object of the legislature in inserting this general clause in the schedule was to counteract the ingenuity of conveyancers attempting to construct deeds of a description not specifically charged with duty in any of the preceding clauses. This being so, it follows that the rule for entering a nonsuit must be made absolute: an instrument has been received at the trial which was not evidence; and, that being withdrawn, there remains nothing to go to the jury (*i*).

Lord Chief Justice TINDAL.—In this case the plaintiffs declared that Hutchins, the testator, being possessed of a certain messuage or dwelling-house, in consideration of 100*l.* paid by the defendant, and of the yearly sum of money, covenants, and agreements thereinafter mentioned on the part of the defendant to be paid and performed, *assigned* the same to the defendant "for and during all the residue and remainder of the said term of years then to come and unexpired"—yielding and paying the yearly sum of 75*l.* The defendant by his third plea puts in issue the fact of the assignment. At the trial a certain deed was tendered on the part of the plaintiffs to prove the affirmative of the issue raised by this plea. This deed was executed by the defendant only; and was stamped with a duty of 1*l.* 10*s.* On the part of the defendant, it was objected, that, this stamp being insufficient, the instrument could not be received in evidence. It was how-

(*i*) The rent reserved in the original lease was 35*l.* per annum: the consideration for the assignment to the defendant was 100*l.* in money and an annual rent of 75*l.*: and it was contended that two ad valorem stamps were requisite if the deed were to be taken as a lease—the one for the consideration money, the other for the 75*l.* rent, or at all events for the 40*l.* increase.

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ever admitted, and we are now to say whether properly or not. It is perfectly clear that the deed in question is not to be considered as the assignment. Therefore, unless it is to be taken as a counterpart of a lease, the stamp is not sufficient. It is contended on the part of the defendant that this comes within the general and sweeping clause in the first part of the schedule to the stamp act of the 55 Geo. 3, c. 184—"Deed (or conveyance) of any kind whatsoever, not otherwise charged in this schedule, nor expressly exempted from all stamp duty;" and consequently that the proper stamp for this deed was 1*l.* 15*s.* it therefore becomes unnecessary to consider whether it is an instrument in any other manner charged in the schedule. On the other hand, it is suggested that the deed in question is either the counterpart of an assignment or the assignment itself, and that a stamp duty of 1*l.* 10*s.* is enough; or that, for the purposes of the stamp act, it is to be held to be a counterpart lease, and properly stamped as such, though for the purposes of pleading it was found necessary to treat the original deed as an assignment. It appears to me, however, that we are not at liberty to call it a counterpart of an assignment; the term "counterpart" is no where used in the schedule in

terest in the premises than the grantor himself had therein. I do not see how the objection can be got over, the parties in the action having treated the deed as an assignment. If it were held to be a lease, the answer is, that the plaintiffs have not proved the affirmative of the issue to be tried. It is with great regret for the consequences that may follow from this decision, that I hold the stamp insufficient to render the deed admissible in evidence: but I think it is always better to adhere to the strict and straight rule, than to suffer ourselves to be led aside by circumstances of hardship in the particular case.

Mr. Justice GASELEE.—I doubted at first whether this deed might not for this purpose be considered as a lease, as it seems to have been so treated at the Stamp-Office. No fraud was intended: the plaintiffs are merely turned round because in point of law as pleaded it operates as an assignment. It is an assignment for the term held by Hutchins; and a good lease by estoppel as between the parties for the excess. Upon consideration, however, I concur with my Lord Chief Justice in thinking that we are not authorised to put any other construction upon the instrument than the plaintiffs themselves have put upon it.

Mr. Justice VAUGHAN.—I most reluctantly concur with the rest of the Court. No fraud was committed; none was meditated. But, inasmuch as the instrument offered in evidence was treated throughout the cause as an assignment, and was produced in support of the affirmative of an issue raised upon the assignment, and it is in fact neither an original assignment nor a counterpart lease, it seems to me to range itself under the general clause in the schedule of the stamp act, as to deeds or conveyances not otherwise charged, nor expressly exempted from duty; and therefore that the stamp it bore, of 1*l.* 10*s.*, was not sufficient.

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Mr. Justice BOSANQUET.—We are bound to decid points arising on the construction of the stamp act upo the same principles as we decide all other questions of la In this case the plaintiffs in their declaration alleged th their testator *assigned* the premises to the defendant f the residue of the term. The defendant by his third pl traverses the assignment. Issue was taken thereon, ar the question the parties went down to try was, whether not the testator had assigned to the defendant. In su port of the affirmative of that issue, a certain deed w produced, which was not the assignment itself, for it a peared to have been executed by the defendant only. was contended that this deed was the counterpart of tl assignment. If so, it is still a deed, and requires a stam The schedule of the act contains no clause making a spe fic charge for counterparts of assignments; and cons quently this must be taken to fall within the general clau applicable to deeds not otherwise charged, nor express exempted from duty, and should have had a 1*l.* 15 stamp. It is said that the effect of this construction w be that a counterpart or duplicate of an assignment w thus be subject to a duty of five shillings more than tl

[redacted]

1834.

Saturday, Nov. 8th.

SHIRLEY v. JACOBS.

Where the word "execution" was used instead of "service," in the indorsement on a writ of capias, the court refused to order the bail-bond to be cancelled, but allowed the writ to be amended on payment of costs.

In an affidavit to hold to bail on a bill of exchange, it suffices that the time the bill had to run, and the fact of its being overdue, appear, though the date of the bill is not mentioned.

IN the indorsement on the process in this cause pursuant to Rule II of Hilary Term, 2 Will. 4 (*a*), the word "execution" was substituted for "service." The defendant having given a bail-bond, Lord Chief Justice Denman, at Chambers, ordered that it might be delivered up to be cancelled on the ground of the above variance.

Mr. *Miller*, on a former day, obtained a rule nisi to rescind that order.

Mr. *Mansel* shewed cause.—He contended (*b*) that the variance complained of was a substantial irregularity: he also objected to the affidavit to hold to bail, which (the action being brought upon a bill of exchange) omitted to mention the date of the bill; but, it appearing that the affidavit stated the time the bill had to run, and that it was overdue, this objection was overruled.

Mr. *Miller*, in support of his motion, submitted that the word "execution," though not the word used in the rule, was nevertheless the more proper word as applied to bailable process, and the one that had always been adopted before the making of the rule; and that the variance being so immaterial, and only a non-compliance with a form given by rule of court, and not by an act of parliament, and in a matter upon which there had been much difference of opinion and of practice among the judges at

(*a*) Ante, Vol. 1, p. 431.

(*b*) Mr. *Mansel* also objected that the affidavit on which the rule was obtained merely professed to state the *substance* of the Lord Chief Justice's order, whereas, he submitted, it should have been set forth, or at least an office copy should have been annexed to the affidavit. But the Court held that it was enough to state the substance of the order.

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Chambers, it was at all events not a case in which the court would visit the party with costs.

Lord Chief Justice TINDAL.—The subject is one that has lately engaged the attention of the judges, the majority of whom are of opinion that the form given by the rule should be strictly adhered to; but, at the same time they have felt that the non-compliance with a rule of court in this particular ought not to be visited with the same degree of punishment as would be inflicted for disobedience to an act of parliament, and therefore that the proceedings should not be set aside, but that the plaintiff should have leave to amend on payment of costs. We therefore think that the order in the present case has gone a little too far in directing the proceedings to be set aside; but that the present rule must be discharged—the plaintiff having leave to amend his writ, on payment of the costs of that amendment, and the defendant having four days to put in bail

Rule discharged accordingly (c).

(c) See the same point determined in Colls v. Morpeth, 3 Dowl. P. C.

Mr. Serjeant *Wilde* and Mr. *Barstow*, for the tenant, suggested that, the absent knight being out of the jurisdiction of the court, another might be substituted, as was done in the case of *Tooth*, dem., *Bagwell*, ten. (*a*), where, it appearing, on the day appointed for the trial at bar of a writ of right, by the sheriff's return, that one of the knights was, from illness, incapable of attending, which was confirmed by the affidavit of his medical attendant—the court allowed a venire to issue for summoning another knight, and a habeas corpora to compel the attendance of the three knights who had already appeared, and of the recognitors, on a subsequent day. [Mr. Justice *Gaselee*.—In that case it was made to appear to the court that Sir George Alderson, one of the knights, was permanently ill, and likely to continue so. Have we enough on the present occasion to act upon? The absence of the knight in *Tooth* v. *Bagwell* arose from the act of God; here by the party's own wilful default.]

Lord Chief Justice TINDAL.—The law requires that four knights shall be in attendance. It is perfectly clear that we cannot proceed with the trial in the absence of one of them: nor do I think the circumstances would warrant us in pursuing the course that the court adopted in *Tooth* v. *Bagwell*. All that we can do is to impose a fine upon the absent knight (*b*). The case must therefore stand over, unless the parties will consent to some middle course.

Mr. Serjeant *Merewether*, for the demandant, refused to consent; whereupon—

A day was given to Monday the 17th instant: and on that day an adjournment was directed to Saturday, the 17th January, 1835.

(*a*) 11 J. B. Moore, 236.

(*b*) A fine of 50*l*. was accordingly imposed upon Sir John Rennie, which was afterwards remitted.

1834.

Wednesday, Nov. 12th.

The defendant's attorney called at the plaintiff's shop to pay him the debt, having the money in his pocket for that purpose, and mentioned the precise sum, and at the same time put his hand in his pocket for the purpose of taking out the money, but did not actually produce it, the plaintiff saying he could not take it:—Semble, that this was a sufficient tender, the plaintiff having dispensed with the actual production of the money: but, quære whether such dispensa-

FINCH *v.* BROOK.

THIS was a writ of false judgment from the county court of Cambridgeshire. The plaintiff declared in the court below for a debt of 1*l.* 13s., for the price and value of drugs, chemical preparations, and other goods sold and delivered by him to the defendant within the jurisdiction of the county court. The defendant, as to the sum of 1*l.* 12*s.* 5*d.*, part of the said sum of money in the said declaration mentioned, said that the plaintiff actionem non, &c., because he said that the defendant at the time when the said sum of 1*l.* 12*s.* 5*d.*, parcel &c. became due and payable from the defendant to the plaintiff, the defendant was and from thence hitherto had been, and still was, ready to pay to the plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel &c., to wit, at Cambridge, in the county of Cambridge, and within the jurisdiction of this court [the county court], and that, after the time when the said sum of 1*l.* 12*s.* 5*d.*, parcel &c., became due and payable, and before the exhibiting of the bill of the plaintiff in this behalf, to wit, on &c., at Cambridge aforesaid, in the county aforesaid, and

addressed him, and said that he, Tabram, had called
ıe plaintiff to pay him a debt of 1*l.* 12*s.* 5*d.* which the
ndant owed him; that he, Tabram, mentioned the
ise sum to the plaintiff, and at the same time put his
l in his pocket for the purpose of taking out the said
ey, but did not actually produce the same; whereupon
plaintiff in answer said, 'I can't take it' (meaning the
1*l.* 12*l.* 5*d.*; the matter is now in the hands of Mr.
per (whom the plaintiff stated was the clerk of Mr.
ıon, his attorney); that Tabram promised to see Mr.
per, and went away for that purpose, but, having met
conversed with another person, he forgot to do so, and
not see the said Mr. Cooper."

ıdgment having been entered up for the defendant in
county court, the record was brought to this court by
of false judgment. The errors assigned were, amongst
rs—that it did not appear by the record or return
Tabram produced the money so alleged and found by
verdict to have been tendered as aforesaid—that it
ared by the record that the issue between the parties
the sum of 1*l.* 12*s.* 5*d.* was, whether or not the de-
ant tendered that amount to the plaintiff, and not
ther or not he would have tendered it if the plaintiff
not dispensed with the necessity of producing the
ey or making such tender—that it did not even ap-
that the plaintiff did actually dispense with the ten-

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is whether or not there has in this case been a valid tender. The point is one on which a variety of authorities are to be found in the books, all of which tend to shew that the circumstances set out in the verdict do not amount to a tender. There was no production of the money, no dispensation from producing it, no direct offer: and, even if that which passed at the time between the defendant's attorney and the plaintiff did amount to a dispensation, it was not competent to the plaintiff to shew it under the form of plea here adopted. That the production of the money is essential to constitute a valid tender, was held so early as the case of *Suckling* v. *Coney* (*a*).—"Upon a special verdict, upon payment for a redemption of a mortgage, the mortgagor comes at the day and place of payment, and said to the mortgagee, 'Here I am ready to pay you the 200*l.*,' which was of due money, and yet held it all the time upon his arm in bags: and adjudged no tender; for, it might be counters or base coin for any thing appeared:" and Mr. Justice Anderson said—"It is no good tender to say I am ready &c." In Comyns's Digest (*b*) it is said: "If issue be upon the tender, there must be an actual offer."—"The tender alledged must be legal; and therefore it is not sufficient to say paratus fuit solvere, without saying, et obtulit."

The case of *Douglas* v. *Patrick* (*c*) first established the principle that there might be a dispensation under a

[redacted]

B., and C. In *Thomas* v. *Evans* (*d*) it was held, that, to to make a legal tender, there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor; therefore, where the defendant, on departing from home, left 10*l.* with his clerk for the plaintiff, of which the clerk informed the plaintiff when he called and demanded a larger sum, and the plaintiff said he would not receive the 10*l.*, or any thing less than his whole demand, but the clerk did not offer the 10*l.*; this was held to be no tender. Lord Ellenborough there said: "The actual production of the money due, in monies numbered, is not necessary, if, the debtor having it ready to produce, and offering to pay it, the creditor dispenses with the production of it at the time, or does any thing which is equivalent to that. But here on the contrary, it is expressly stated that the clerk *did not offer* the 10*l.*" And Mr. Justice Bayley there cites and adopts the authority of *Dickinson* v. *Shee* (*e*), where it was ruled by Lord Kenyon, that, under a plea of tender, where the plaintiff disputed the quantum, to prove a tender, some money must be proved to be produced, though it is not necessary to prove the exact sum. In *Kraus* v. *Arnold* (*f*), where the defendant ordered A. to pay the plaintiff 7*l.* 12*s.*, and the clerk of the plaintiff's attorney demanded 8*l.*, on which A. said that he was only ordered to pay 7*l.* 12*s.*, which sum was in the hands of B., and B. put his hand to his pocket with a view of pulling out his pocket book to pay 7*l.* 12*s.*, but by the desire of A. did not do so: B. who was called as a

(*d*) 10 East, 101. But see *Glascot* v. *Day*, 5 Esp. Rep. 48, where Lord Ellenborough seems to have been of opinion, that, if the defendant had the money ready for immediate delivery, a declaration by the plaintiff that he would not receive it on account of insufficiency, would dispense with the actual production and offer. In that case, however, the tender was held to be insufficient, the defendant not having the money ready. See Huxham *v.* Smith, 2 Camp. 21.

(*e*) 4 Esp. Rep. 68.

(*f*) 7 J. B. Moore, 59.

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witness, stated that he could not say whether or not h had at the time money enough about him to pay th 7*l.* 12*s.*, but that he had enough in his house, at the doo of which they were standing: Lord Chief Justice Dalla told the jury, that, to constitute a legal tender, the mone must be actually produced, unless the plaintiff dispense with the tender, by expressly saying that the defendan need not produce the money, as he would not accept it: an the court held that there had been no legal tender. So in *Leatherdale* v. *Sweepstone* (*g*), it was held, that, if party tell his creditor that he will pay him so much, an put his hand in his pocket to take out the money, but be fore he can get it out the creditor leaves the room, an the money consequently is not produced till he is gone this is no tender. Lord Tenterden in that case observe that a plea of tender is in practice very seldom successful and he was on that account always sorry to see such plea on the record.

Mr. *Butt*, for the defendant.—A sufficient tender ap pears on the face of the verdict: if not, the evil pointe out by Lord Tenterden in *Leatherdale* v. *Sweepstone* wil

[redacted]

produced to the view of the plaintiff, any more than on the present occasion. In *Polglase* v. *Oliver* (*i*) it was held, that, though a tender, to be strictly legal, must be made in the coin of the realm, and the money should be produced, yet an offer in fact may be made equivalent to a tender in law, by waiver of the legal requisites of a strict undeniable tender, in putting the rejection on a ground which works a dispensation. Thus, an offer of payment in country bank-notes of money due may be in effect a good legal tender; as, where it is refused on the ground of being of insufficient amount (*k*). To invalidate a tender, or divest an offer to pay of the legal effect of tender, if the objection be to the medium of the offer to satisfy, and not to the sum offered, the ground of rejection must be stated, or it is a waiver of the objection of insufficiency *in that particular respect*, and it cannot afterwards be taken advantage of in court, on the score of not being an effective legal tender: in other words, an objection on a point of fact works a waiver of objections on points of law; and such waiver may be, though not expressed, implied (*k*). Mr. Baron Bayley, in *Polglase* v. *Oliver*, says (*l*): "To make an offer to pay money a good legal tender, it ought to be made in the coin of the realm, and the money should be produced. That I take to be clear law. But the party to whom it is made may make the tender which would be strictly speaking defective in point of form, good, by refusing it on other grounds than those which would make it objectionable in point of law. Thus, if the ground of refusal be, that the party demands more, insisting that more is due to him, the creditor cannot afterwards fairly object that the money was not produced, because, by putting the refusal on the ground of that special objection, he waives the strict legal formalities incident to tender, and

(*i*) Price's P. C. Exch. 133, 2 Tyr. 89, 2 Cr. & Jervis, 15.

(*k*) Price's P. C. Exch. 133.

(*l*) Price's P. C. Exch. 134.

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in effect dispenses with them." So, here, the plaintiff by saying "I can't take it," dispensed with the production of the money, and cannot afterwards object to the insufficiency of the tender on the ground of non-production. [Lord Chief Justice *Tindal.*—Here, the defendant's attorney not only did not *produce* the money, but he did not even tell the plaintiff that he had it.] The special verdict finds that Tabram *called on the plaintiff to pay the debt and had the money in his pocket;* but the defendant dispensed with its production. In *Dean* v. *James* (*a*), it was held that a plea of tender of 20*l.* is supported by evidence of the tender of a large sum, though such larger sum was tendered as the sum which the creditor was to receive and not as the sum out of which he was to take the 20*l.*

Mr. Serjeant *Stephen,* in reply, was stopped by the Court.

Lord Chief Justice TINDAL.—The ground upon which I found my judgment in this case is this:—All the cases agree, that, to constitute a valid tender, there must either be an actual production of the money, or an express or implied dispensation. In the present case the money was not produced; and therefore the question is whether there was any actual or implied dispensation on the part of the plaintiff to excuse the non-production. Now, it must be

special verdict a demand and refusal, without finding a conversion, the court would not, in many cases, be warranted in inferring it. In Comyns's Digest (*n*), it is said: "The jury may find a general verdict for the plaintiff, where the special matter found would be against him; as, in trover, on proof of a demand and refusal, they may find for the plaintiff, but, if it be found specially, it will be adjudged no conversion. On proof of a voluntary feoffment to a son, the jury may find it fraudulent as to creditors &c., but, if it be found specially, it will not be judged so (*o*)." The present case seems to me to fall within that authority: we are not at liberty to imply that which the jury have not thought fit to find. I therefore think that the plea of tender has not been made out, and consequently that the judgment of the court below must be reversed.

Mr. Justice GASELEE concurred.

Mr. Justice VAUGHAN.—I am also of opinion that the judgment of the county court must be reversed; though, if the question had occurred at Nisi Prius, the judge would probably have directed the jury, under the circumstances stated in the special verdict, to find a dispensation. I think we, however, are not at liberty to draw such an inference. In *Jones* v. *Barkley* (*p*) it was held, that, where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part. So, in cases of tender, there are many authorities to shew that the actual production of the money may be dispensed with.

Mr. Justice BOSANQUET.—I concur with the rest of the

(*n*) Com. Dig. "Pleader," (S.), 8. (*o*) 10 Rep. 56. b.
(*p*) 2 Doug. 684.

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court on the sole ground that the question arises case on a special verdict which does not find an tender. I am by no means prepared to say that dence given at the trial of the cause in the count was not sufficient to warrant the jury in finding t plaintiff dispensed with the actual production of the but I think the special finding does not enable us t to that conclusion.

Judgment reverse

(q) See *Harding* v. *Davis*, 2 Car. & Payne, 77. There, at an interview between the plaintiff and defendant, the defendant being willing to pay 10*l.*, a third person present offered to go up stairs and fetch that sum, but was prevented by the plaintiff's saying, "I cannot take it." Lord Chie Best held it to be a gooc and that, although the d did not at the time take what was done, yet his it afterwards was a suffi tification of the act.

Thursday, Nov. 13th.

The court refused to allow an an amendment

BRADLEY and Others *v.* BAILLIE.

MR. *HARRISON*, on a former day, obtained calling on the defendant to shew cause why the wri pias ad satisfaciendum issued in this cause should

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the ground of the plaintiffs' having given time to the principal; and that the second bail, not being aware of this fact, had pleaded to the action against him. He therefore submitted that the court would not allow the proposed amendment, inasmuch as it would prejudice the bail—or, at all events, not without imposing terms upon the plaintiffs.

Lord Chief Justice TINDAL.—The justice of the case seems to me to be that the rule be made absolute, on payment of the costs of the action against the bail, and of the motion; the bail having one week's time to render the principal.

Rule accordingly.

SYWOOD *v.* DOGHERTY.

Thursday, Nov. 13th.

A notice of bail omitting to state the residence of the bail "for the last six months," is an irregularity of which the court will take notice, though the bail be unopposed.

THE notice of bail in this case omitted to state that the bail had resided in the respective places of which they were described "for the last six months," as required by the 2nd rule of Trinity Term, 1 Will. 4 (*a*). They were not opposed.

Mr. *Archbold* submitted, that, by not opposing, the plaintiff had waived the irregularity. He cited *Bigg* v. *Dick* (*b*). There, notice was given of justification "of F. D. and S. A., the bail already put in for the defendant, and of whom the plaintiff had before had notice." No notice of bail had been given: but the Court held, "that, an exception having been entered, the plaintiff must have had notice of the place of abode of the bail when he entered the exception in the filacer's book."

(*a*) 5 Moore & Payne, 813. (*b*) 1 Taunt. 17.

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PER CURIAM.—Though the justification was not opposed, still it is better that we should in all cases adhere to the form given by the rule. The defendant may be allowed four days to give a fresh notice—the proceedings being stayed in the meantime.

Rule according (*c*).

(*c*) See Fenton *v.* Warre, 1 Dowl. P. C. 295. Johnson's Bail, 1 Dowl. P. C. 438. Ward's Bail, 1 Dowl. P. C. 596. But see Figg's Bail, 1 Dowl. P. C. 124, where it was held to be sufficient to state the residence of the bail for the last six months in the notice *of bail*, without repeating it in the notice *of justification*. And semble that the omission to state the residence of the bail for the last six months in the notice of bail, is not such a defect as will entitle the plaintiff to treat the notice as a nullity, and attach the sheriff—The King *v.* The Sheriff of Middlesex, 2 Dowl. P. C. 5.

In the Matter of SARAH LUKE, an Infant, Wife of GEORGE LUKE.

Friday, Nov. 14th.

To meet the special circumstan-

BY the 6th section of the 11 Geo. 4 & 1 Will. 4, c. 60, it is enacted, "that where any person seised or possessed

married George Luke, the court of Chancery for that county had, in pursuance of the authority given it by the above statute, directed a conveyance. Mrs. Luke accordingly attended before certain commissioners for the purpose of acknowledging a deed under the 3 & 4 Will 4, c. 74; when, the commissioners, finding upon inquiry, to which they was instigated by the youthful appearance of the lady, that she was only seventeen years of age, refused to take her acknowledgment, inasmuch as they could not certify according to the form prescribed by the 84th section of the statute, and by the rules of this court of Hilary Term, 4 Will. 4 (*a*).

Mr. Serjeant *Adams*, upon affidavits disclosing these facts, moved for such an order as the court might think calculated to meet the exigency of the case.

Lord Chief Justice TINDAL.—The 84th section of the 3 & 4 Will. 4, c. 74, enacts, that, when a married woman shall acknowledge any deed, the judge, master in Chancery, or commissioners taking such acknowledgment shall "sign a certificate of the taking such acknowledgment, to be written or engrossed on a separate piece of parchment; which certificate, *subject to any alteration which may from time to time be directed by the court of Common Pleas*, shall be *to the following effect:*" it then gives the form of the certificate, the concluding sentence of which is as follows:—" And I [*or* we] do hereby certify that the said [*married woman*] was, at the time of her acknowledging the said deed, *of full age* and competent understanding, and that she was examined by me [*or* us], apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same." I therefore think that we have authority to

(*a*) Ante, Vol. 4, p. 116.

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vary the form of the certificate where the justice of the case requires it, and the act cannot otherwise be carried into effect. An order may be drawn up authorizing the commissioners in their certificate to omit the words "of full age."

The rest of the Court concurring—

Fiat (*b*).

(*b*) See the remarks of Mr. Jarman on this subject, in his valuable notes to Mr. Bythewood's collection of Precedents in Conveyancing, Vol. 9, p. 486.

MARY SLATTER, Widow, Demandant, GEORGE SLATTER, Tenant.

Friday, Nov. 14th

In a writ of dower, in support of a plea of election by the widow to take an annuity secured to her by deed in lieu of dower, the tenant proved a re-

THIS was a writ of dower, tried before Lord Chief Justice Tindal, at the Sittings in London after Michaelmas Term, 1833. The issue was whether or not the demandant had elected to take a provision in lieu of dower under a deed bearing date the 14th January, 1831. At the suggestion of the court the facts were stated for their opinion

[redacted]

personal estate, consisting of stock in trade, book debts, ready money and securities for money, and money in the funds in his own name, together with 6,000*l.* Bank 3*l.* per cent. Annuities standing in the joint names of the intestate and of Charles Druce the younger, John Druce, and George Nugent, which said last mentioned sum of 6,000*l.* was held upon the trusts contained in a certain indenture of the 14th January, 1831, set forth in the pleadings in the cause hereinafter referred to. Mary Slatter, the demandant, employed T. A. Lock as her attorney and solicitor, to assert her claims at law and in equity upon the real and personal estates of her late husband, the intestate. George Slatter the elder, and George Slatter the younger, employed the same attornies in the suits in law and equity. Mary Slatter, the demandant, on the 22nd October, 1832, came accompanied by one J. Kitching to the freehold house in question, and declared she came to claim such rights as she was entitled to as the widow of the intestate, and continued therein until the 31st of that month, when the tenant turned her out by force; and at that time Kitching in her presence and by her assent declared that she was entitled to remain in the house for forty days after the decease of the intestate: and on the 22nd November, 1832, the demandant caused a notice in writing to be served on George Slatter the younger (a copy of which notice was annexed to and formed part of the case), and commenced the present action on or about the 22nd January, 1833, to which action the tenant appeared by his said attornies; and on the 24th May following pleaded the pleadings in this cause as hereunto annexed, and to which the demandant and tenant were to be at liberty to refer as part of the case (*a*).

(*a*) The plea and replication were as follow:—That the said Mary Slatter ought not to have her dower of the tenements aforesaid, with the appurtenances aforesaid, of the indowment of the said John Slatter theretofore her husband, because he said that theretofore, and after the marriage of the said John Slatter with the said

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The demandant demurred to the second plea, and took issue on the first and third pleas on or about the 15th

Mary Slatter, to wit, on the 14th January, 1831, to wit, at London, by a certain indenture then and there made between the said John Slatter of the first part, the said Mary Slatter of the second part, and the said Charles Druce the younger, John Druce, and George Nugent of the third part, which said last mentioned indenture being in the possession of the said Charles Druce, John Druce, and George Nugent, the said George Slatter cannot produce the same to the Court here, the date whereof is a certain day and year therein in that behalf mentioned, to wit, the day and year last aforesaid, after reciting as therein is recited, it was witnessed (among other things) that, in pursuance of a certain proposal and agreement in the said last mentioned indenture before particularly mentioned and described, he the said John Slatter did in and by the said last-mentioned indenture for himself, his [illegible] executors, and administra- [illegible] promise [illegible] term of her natural life, one annuity or yearly sum of 180*l.* of lawful money of Great Britain, for the support and maintenance of the said Mary Slatter, the said annuity or yearly sum of 180*l.* to be paid and payable by equal half-yearly portions, on the 10th January and 10th July in each and every year, free and clear of and from all deductions and abatements whatsoever, and should and would make the first payment thereof on the day of the date of the last-mentioned indenture, and the next payment on the 10th July next ensuing the day of the date of the said last-mentioned indenture: Provided always, and it was in and by the said last-mentioned indenture agreed by and between all the parties to the said last-mentioned indenture that the said John Slatter, his executors and administrators, should be indemnified and reimbursed out of the said last-mentioned annuity or yearly sum of 180*l.* all such debts [illegible] claims, or demands, costs, damages, and expenses, and from an [illegible] ment of all and a [illegible]

ry, 1833. The demurrer came on to be argued on h of November last [1833], on which day, the ten-

by custom, which she the ry Slatter at any time after ;ing the said last mention- nture might claim, chal- ır demand from, out of, or the said John Slatter or present or future estate personal, and also of and l claims and demands, ac- d suits whatsoever, on ac- r in respect thereof, or on or in respect of any debts ıhe the said Mary Slatter ſter the making the said last- ıed indenture contract as d, and of and from all costs, , and expenses whatsoever e the said John Slatter, his xecutors, and administra- · any of them, should or ıt any time after the making l last-mentioned indenture ıustain, or be put unto for ;ason or means of the said latter contracting any such debts, or demanding any mony or maintenance (ex- ı aforesaid), or any such or thirds, or for or by rea- in respect of any other cause, or thing whatso- hich might be borne, paid, ;d, or suffered by him the ·hn Slatter, touching or ıing the said Mary Slatter g apart from him the said Slatter as aforesaid, or ıg or concerning her beha- ır conduct during the said ion in the said indenture mentioned; and also that said Mary Slatter, or any person or persons on her behalf should not nor would at any time after the making the said last-mentioned indenture, commence or prosecute any suit or suits in any ecclesiastical or other court for compelling or obliging the said John Slatter to cohabit or live with the said Mary Slatter, nor without the consent of the said John Slatter, visit him or knowingly come or go into any house or residence where he might dwell or reside, nor for any cause nor under any pretence whatever sue, prosecute, or any wise molest John Slatter during such separation as aforesaid; and moreover that the said Mary Slatter should and would at any time or times after the making the said last-mentioned indenture make, do, and execute, or join and concur in making, doing, and executing all such acts, assurances, matters and things whatsoever as should be requisite or expedient for the purpose of releasing, barring, extinguishing, and destroying all dower or thirds and right or title to dower or thirds at common law or by custom, which she the said Mary Slatter could or might claim or demand into or out of any real or personal estate or effects whatsoever of or belonging or to belong to the said John Slatter; and the said George Slatter said that afterwards and after the making the said indenture, to wit, on the 21st October, 1832, to wit, at London, the said John Slatter heretofore

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ant not appearing, the court ordered that judgment be entered for the demandant, and on the followi judgment was signed accordingly; and notice of tı on the same day given for the Sittings after last Micl Term upon the issues joined on the first and third

It was agreed and arranged betwen the saic Slatter, the demandant, and George Slatter the y the tenant, that the business of the intestate sh carried on for the benefit of all parties until the ri

the husband of the said Mary Slatter, died; after whose death, to wit, on the day and year last aforesaid, to wit, at London aforesaid, said Mary Slatter elected to have, take, accept, and receive the said last-mentioned annuities or yearly sum of 180*l.*, in manner and form aforesaid, in full recompense and satisfaction of her whole dower of the messuage and tenements aforesaid, with the appurtenances aforesaid, of the indowment of the said John Slatter, heretofore her husband; and afterwards, to wit, on

plea alleged, ought not t red from having her dower in this behalf, beca testing that she the sa Slatter did not take, hav and receive of and from Charles Druce, John D George Nugent the saic 90*l.* of the annuity afore the space of half a yea on the day and year in plea mentioned, in ma form as the said Georg hath above in his said t in that behalf alleged, fo

the demandant were ascertained and settled; and George Slatter, the tenant, remained in possession of the intestate's dwelling-house, and is now in possession thereof.

On the 5th of June, 1833, Mary Slatter, the demandant, filed her bill in his majesty's court of Exchequer against George Slatter the elder, the administrator of the intestate, and others, in respect of her claims upon the intestate's personal estate. George Slatter the elder, on the 9th of August, 1833, obtained by consent an order in the said last-mentioned cause, which order is hereinafter referred to as a part of the case. Mary Slatter, after making the said order of the 9th of August, 1833, viz. on the 9th of September, 1833, for the first time since the death of the intestate, received the sum of 180*l.*, being two half years' dividends on 6,000*l.* 3*l.* per cent. Bank Annuities, which accrued due subsequently to the intestate's death. After the making of the said order of the 9th August, 1833, George Slatter the younger, the tenant, also commenced and now carries on the trade or business of the intestate in his dwelling-house in Cullum-Street aforesaid. On the 1st November last [1833], George Slatter, the tenant, filed his bill in the High Court of Chancery against the demandant, setting up the said deed of separation in bar of dower, and alleging that the demandant had since the death of the intestate elected to take the annuity, and praying an injunction against the proceedings in this action; in which suit an injunction was obtained for want of answer, which answer was put in on the 4th January, 1834, and the injunction was dissolved on the 4th February, 1834, by his Honor, the Vice-Chancellor.

The cause came on to be tried on the 10th December, 1833, before Lord Chief Justice Tindal, when a verdict was found for the demandant on the two issues—damages, 14*l.*, the annual value of the premises being found by the jury at 45*l.* per annum. On the trial, the tenant, without

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pleading puis darrien continuance, offered in evidence on the third plea the deed of separation of the 14th January, 1831, a certain power of attorney from John Slatter, the intestate, Charles Druce the younger, John Druce, and George Nugent, to Mary Slatter, the demandant, authorizing and empowing her to receive the dividends on 6,000*l.* 3*l.* per cent. Bank Annuities, and the dividend warrants for two half years' dividends accrued on such stock, signed by Mary Slatter as such attorney, both bearing date the 9th September last; whereupon the demandant proposed to put in the said order of the court of Exchequer of the 9th of August last, which was annexed to and found part of the case (*b*).

The questions for the consideration of the Court were—Whether the evidence given of the receipt of the 180*l.* on the 9th September, 1833, was sufficient to support the issue on the third plea, of election, in bar of dower; and whether the order of the 9th August, 1833, was admissible to shew under what circumstances the 180*l.* was so received.

Mr. Serjeant *Merewether*, for the demandant.—The first

[redacted]

contrary, prior acts appear plainly shewing the intention of the party not to elect. If this matter had been pleaded puis darrein continuance, it must have been verified on oath. To allow it to be given in evidence without so pleading it, would be to permit the tenant to have all the advantage of a plea puis darrein continuance, without the security of his oath.

The order of the court of Exchequer, in pursuance of which the dividends were received, and in which it was expressly provided that such receipt should be without prejudice, ought to have been received in evidence. It was rejected on a suggestion that it was res inter alios acta; being an order made in another cause not between the same parties. But it was offered in evidence merely for the purpose of shewing the intention with which the money was received; and it was equally admissible for this purpose whether it was an order made in a cause between these or between other parties. If admissible, it was a decisive answer to the case.

[Lord Chief Justice *Tindal*.—Supposing that the demandant did elect as the tenant alleges, how can a court of law take cognizance of the matter? Is it not rather a question for a court of equity?] All the cases with respect to election, are cases in equity: there are none to be found in law. Lord Coke, speaking of the requisites of an assignment in bar of dower, says (*c*): "It must be either of some part of the land whereof she is dowable, or of a rent or some other profit issuing out of the same, either before judgment or after, which rent may be assigned to her by parol. But an assignment of other land whereof she is not dowable, or of a rent issuing out of the same, is no bar of her dower." A fortiori an assignment of funded property is no bar of dower.

Mr. *W. H. Watson, contrà*.—The fact of the receipt of

(*c*) Co. Litt. 34. a.

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the money taking place after issue joined, makes no difference: that fact was evidence of a prior election; as, in trover, a demand and refusal are only evidence of a conversion. In *Wilson* v. *Girdlestone*(*d*), a demand and refusal after action brought, was held to be evidence of a conversion before the commencement of the action.

The suit in the Exchequer in which the order was made that was offered in evidence n this cause, was a suit between other parties. It is one of the first principles of the law of evidence, that a record, to be admissible, must appear to be in a cause between the same identical parties, and touching the same identical subject matter. [Lord Chief Justice *Tindal*.—The question the jury had to determine was, what operated upon the mind of the demandant at the time she received the money: it was merely for the purpose of shewing this that the order was tendered.] It may be admitted that any act or agreement of the party accompanying the receipt of the money, would be evidence: but this was a mere matter of agreement entered into between other parties in another suit.

[Upon the point suggested by the court, time was given to Mr. *Watson* to look into the authorities. Having done so, he admitted that they were against him, unless the election of the demandant to take the annuity provided by the deed of January, 1831, could be said to [illegible] of the dower, independently of the statute

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if she had elected to take the annuity in satisfaction of her dower, she would not have taken it earlier. As to the other point, I think it was competent to the demandant to give in evidence anything tending to shew quo animo she received the dividends.

Mr. Justice VAUGHAN.—I am of the same opinion. Regard being had to the issue to be tried between the parties, it is impossible to hold that the receipt of the dividends in September, 1833, issue being joined in the preceding Hilary Term, could be evidence upon that issue. The simple fact of the receipt of the money under these circumstances, was the only evidence offered on the part of the tenant to shew affirmatively that the demandant elected to take in lieu of her dower the provision mentioned in the deed of January, 1831; and that long after she had by bringing the present action declared her election to retain her dower. I think the evidence was not admissible: and that, being admitted, it has no operation. The case of *Wilson* v. *Girdlestone* (*a*), which was cited as having ruled that a demand and refusal after action brought was evidence of a prior conversion, struck me as being a

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had and received by the defendant to the use of the plain tiff's wife—not stating whether before or since the marri age; and it was held not sufficient.

It appeared that the defendant had been arrested on th 5th September; that bail above were put in on the 8th excepted to on the 27th, and subsequently rejected for in sufficiency.

Mr. Serjeant *Andrews* now shewed cause.—He admitte that the affidavit was informal: but contended that the ap plication was too late, the defendant having delayed i until he had failed in his attempt to justify bail; wherea the practice of the courts required motions for settin aside process or proceedings for irregularity to be mad promptly, *Downes* v. *Witherington* (*b*). In *Mammatt* v *Matthew* (*c*), the defendant being arrested, applied to judge to be discharged, on the ground of a supposed de fect in the affidavit to hold to bail: the application bein dismissed, the defendant requested the plaintiff's attorne to consent to receive certain persons as bail without oppo sition. The latter consented upon the understanding tha the decision of the judge was acquiesced in: and the cour

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Mr. *Williams*, in support of the rule.—In the cases cited the defects were of mere form; here, it is one of substance. The objection being that there is no sufficient affidavit to warrant the writ, no subsequent default on the part of the defendant could cure the defect, which the court may remedy at any stage of the proceedings.

Lord Chief Justice TINDAL.—Here is at all events a positive affidavit that the defendant is indebted to the plaintiff. Upon the whole, I think the justice of the case will be attained by discharging this rule; the defendant being at liberty, on payment of the costs of the former opposition of the bail, and the costs of the motion, and giving four days' notice, and putting the plaintiff in the same situation he would otherwise have been in, to justify fresh bail.

The rest of the court concurring—

Rule discharged.

LOWE *v.* CHIFNEY,

Friday, Nov. 14th.

A plea to an action on a bill of exchange, by an indorsee against the acceptor, that the bill was accepted without any consideration passing from the drawer to the acceptor: —Held bad, on demurrer.

THIS was an action of assumpsit on a bill of exchange, by the indorsee against the acceptor. The defendant pleaded that the bill was accepted without any consideration passing from the drawer to the acceptor. The plaintiff demurred, assigning for cause that the mere want of consideration was no defence in an action at the suit of an indorsee.

Mr. Serjeant *Bompas*, in support of the demurrer, was stopped by the Court, who called on—

Mr. *Alexander* to support his plea.—*Heath* v. *Sansom* (*a*)

(*a*) 2 Barn. & Adolph. 291.

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is a distinct authority that the want of consideration a between the acceptor and the drawer is so far a defence to an action on the bill at the suit of an indorsee, that it throws upon him the onus of proving that he took the note for value. There, S. being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees indorsed it over, and the indorsees sued the parties who appeared to be makers: and it was held that this note was made in fraud of S.'s partner in the second firm, and could not be enforced against him by the payees, and that, at least under these circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration; and also (Mr Justice James Parke dissenting) that, in all cases where from defect of consideration, the original payees cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for. It may be said that the question is one that arises more

[redacted]

therefore, the defendant could not otherwise set up the proposed defence than by putting it on the record in the manner he has here done; and thus calling on the plaintiff to reply that which he would formerly have been compellable to give in evidence under the general issue.

Lord Chief Justice TINDAL.—I take the distinction between the case of *Heath* v. *Sansom* and the present to be this, viz. that there the question arose on evidence given at the trial under the general issue; whereas here it arises on a plea professing to be an answer to the action. In *Heath* v. *Sansom* suspicion was thrown on the bill, and the party suing upon it was affected with notice of the circumstances under which it had originally been obtained, and therefore he was called upon to prove that he had given a consideration for it. Here, however, is nothing but the simple allegation that no consideration passed from the drawer to the acceptor: nothing to shew mala fides in the indorsee; but the mere fact that the bill was an accommodation bill. It therefore seems to me that we should break through the general rule by which it is held that an indorsement is prima facie evidence of consideration, if we held this to be a good plea.

Mr. Justice GASELEE concurred.

Mr. Justice VAUGHAN.—The plea is not that the indorsee gave no consideration for the bill, but that the acceptor received from the drawer no consideration for his acceptance. How therefore can that be said to be a circumstance within the knowledge of the indorsee, so as to throw upon him the burthen of proof?

Mr. Justice BOSANQUET.—I am also of opinion that the plea in this case affords no answer to the declaration. In *Heath* v. *Sansom* the question arose on the general issue;

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a degree of suspicion was thrown on the transaction, sufficient to warrant the jury in concluding that no consideration passed between the parties. It is upon this ground that Mr. Justice James Parke puts his judgment. "It is sufficient," he says, "for the decision of this case to say that its circumstances were in themselves such as called upon the plaintiff to prove that value was given for the indorsement: for, the Droitwich Company could not have sued the defendant Evans (the partner) on this note; it must be taken to have been given to them by Sansom in fraud of Evans; and, when we find the plaintiff suing him, instead of the Droitwich Company, who are solvent, it is impossible not to suspect that the note has been indorsed to the plaintiff to enable him to sue Evans, and not bona fide for a valuable consideration. This creates a suspicion which the plaintiff ought to clear up; and on that ground I am of opinion that a nonsuit should be entered." But, when the matter is set out in a special plea, we are bound to see that there is some legal answer to the plaintiff's demand.

Judgment for the plaintiff.

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Spitta v. *Woodman* is at best doubtful, the statement of its facts not being borne out by the anterior volume of Taunton to which reference is made. Had the rule in the present case been confined to the reduction of the damages, the plaintiffs probably would not have opposed it: but, the rule praying that a nonsuit might be entered, they were compelled to come and protect their verdict. The case of *Routh* v. *Thompson* (*d*) shews that the distinction suggested between a special case and an ordinary motion is untenable. There a special case was reserved, to try whether the plaintiff was entitled as for a total loss, and, if not, whether he was entitled to recover as for a return of premium; the defendant had not paid the premium into court: the court held that he was not entitled to recover a total loss, but that he was entitled to a return of premium, and nothing was said about costs: the master of the King's Bench refused to allow any costs except those of the count for money had and received, and such parts of the briefs and evidence as applied to it—and the court directed him to review his taxation. *Garland* v. *Jekyll* is also in point for the plaintiffs. There, two questions were submitted for the opinion of the court on a special case, and, after argument, one of them was with [illegible] held that the plaintiff [illegible]

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ıded that the rule being in the alternative, calling on the ıintiffs to shew cause why a *nonsuit* should not be en- ed, or why the damages should not be reduced, the ıintiffs were compelled to come and shew cause against : rule, in order to support their verdict. If it had ap- ared that there was any distinction between the costs in : one case and the other, the question would have en different. But, the amount of the costs is precisely : same whether the rule embraces two grounds or ly one. The defendant was at all events obliged to me to the court to get the verdict against him reduced: d the learned judge who tried the cause thought the ıint a proper one to move upon. The plaintiffs might ıve given notice to the defendant that they had aban- ɔned the damages: and then the latter would have gone ı upon the rule as to the alternative at the hazard of ɔsts. I think it would be unjust to hold that the plain- ffs, having in effect failed in their opposition to the rule, re nevertheless entitled to the costs as costs in the cause. therefore think the prothonotory has exercised a sound iscretion.

The rest of the court concurring—

Rule discharged.

STEELE *v.* STERRY and Others.

Saturday, Nov. 15th.

Motion for leave to plead several matters—1. non assumpsit—2. payment as to part—3. as to part, that the goods were warranted like the sample—4. ı to part, that the goods were warranted to be of good merchantable quality—5. that they were arranted to be one ton weight of black lead :—First and fourth disallowed.

THIS was was an action of assumpsit for goods sold and elivered.

Mr. *W. H. Watson*, on the part of the defendant, moved ɔr leave to plead the following pleas—1. non assumpsit— . payment as to part—3. as to part, that the goods were

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warranted like the sample—4. as to part, that the goods were warranted to be of good merchantable quality—5. that the goods were warranted to be one ton weight of black lead.

Lord Chief Justice TINDAL.—There is no pretence for the first plea: if part of the price has been paid, as alleged in the second, the defendant is precluded from saying there is no contract, which is by the new rules the limit of non assumpsit. The third and fourth pleas are also incompatible: if the defendant stands upon the express warranty that the goods were like the sample, he ought not also to be allowed to set up a warranty in law that the goods are merchantable. Let the first and fourth be struck out.

The rest of the court concurring—

Rule accordingly.

Saturday, Nov. 15th.

Motion for leave

TRIEBNER *v.* DUERR.

THIS was an action of indebitatus assumpsit for work an[illegible] and for money paid to the use of the defendant.

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amples of pleas that may be pleaded together, w
" pleas of payment, and of accord and satisfaction,
release, are distinct, and are to be allowed." Thes
many others that might be referred to, are instan
pleas that cannot all be true, and in that sense are
sistent. It was not intended that the defendant sho
shut out from any fair and bonâ fide ground of de
Though, where pleas that are manifestly inconsister
each other, appear to be vexatiously pleaded, and f
purpose of occasioning inconvenience and expense
plaintiff, the court will not allow them.

Mr. Justice GASELEE.—The illegality of the con
tion could not be given in evidence under the g
issue.

Mr. Justice VAUGHAN.—I think the proposed
present two distinct grounds of defence, and the
may be allowed.

Mr. Justice BOSANQUET.—This case stands up
statute of Anne, and not upon the new rules. Th

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Monday, Nov. 17th.

In covenant for non-payment of rent reserved by a lease containing a clause prohibiting the carrying on of certain trades upon the demised premises without the license of the lessor, the defendant pleaded that his immediate lessor, who held under one A. C., subject to a similar covenant, gave him a license to carry on one of those trades, and that, by reason and on the ground that the defendant so carried on such trade, R. C. "having good right and title to the demised premises as heir at law of A. C., evicted the defendant: —Held, that, the plea not negativing that the trade was carried on with the license of the original lessor, did not disclose such right in R. C. to evict, as to afford an answer to the plaintiff's claim for rent.

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COVENANT for rent. The defendant pleaded an eviction by title paramount. The question came before the court on demurrer, in the course of the last term—see Vol. 4, p. 672, when the defendant obtained leave to amend his plea. The amended plea was in substance as follows: —After setting out on oyer the lease under which the defendant held the premises of the plaintiffs, dated the 9th July, 1830, containing amongst others a covenant that the defendant, his executors, &c., "should not nor would at any time or times during the term thereby granted, set up, use, exercise, carry on, or follow, or permit or suffer to be set up, used, exercised, carried on, or followed, in, upon, or about the said messuage, &c., the trade or business of a carpenter, *common brewer*, tallow chandler, melter of tallow, sugar baker, soap boiler, tobacco-pipe maker, butcher, dyer, dresser of flax or hemp, blacksmith, farrier, *victualler or retailer of beer, ale, or spirituous liquors*, distiller, pewterer, brazier, tin worker, brothel-house keeper, or any other nauseous or offensive trade, occupation, or employment whatever, without the leave, license, and consent in writing of the lessors, their heirs and assigns, first had and obtained"—a covenant for re-entry in case of breach—and also an indenture of the 21st December, 1815, between Robert Chantrell and Mary Ann, his wife, and one S. Ponder, whereby the former demised to the latter the premises in question for a term of 21 years from the Midsummer then last, and which lease contained a covenant in the same words as that above set out, and also a covenant for re-entry by Chantrell and wife, and the heirs and assigns of the wife, in case of breach—and an averment that all the estate &c. of Ponder in the premises on the 8th July, 1830, came to the plaintiffs by assignment—the plea proceeded to aver, "that the plaintiffs, after the

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making the said indenture in the declaration mentioned, to wit, on the 9th July, 1830, to wit, in &c., by a certain license or consent in writing, did authorize and permit the defendant to use and exercise (*a*) *the* trade of *a* retail brewer, *that is to say, the business of a brewer and a retailer of beer*, upon the said messuage or dwelling-house in the declaration mentioned; and that, on &c., at &c., the defendant entered on the same premises demised to him as aforesaid, and did then and there, *after the said consent was so given as aforesaid, and* before any of the rent in the declaration mentioned became due and payable, use, exercise, carry on, and follow *the business of a retail brewer and of a retailer of beer on the said demised premises;* and that, whilst he was in the possession and enjoyment of the said premises as aforesaid, and whilst he was so using, exercising, carrying on, and following the said trade of a *retailer of beer on the said demised premises* as aforesaid, and by reason and on the ground that the said defendant so carried on the said business of a *retailer of beer* as aforesaid, and the forfeiture of the said lease secondly above mentioned occasioned thereby, one R. D. Chantrell having good right and title to the said demised premises, with the appurtenances, as eldest son and heir at law to the said Mary Ann, and before any part of the said rent in the declaration mentioned became due and payable, to wit, in Michaelmas Term, 1 Will 4,

[redacted]

then tenant in possession of the said demised premises, with the appurtenances; and such proceedings were thereupon had in the said court, that he the said R. D. Chantrell, in the name of the said John Doe, his lessee aforesaid, to wit, in Trinity Term, 1 Will. 4, by the consideration of the same court, recovered against the said Richard Roe a certain term then to come (among other things) of and in the said demised premises, with the appurtenances; and afterwards in the same term a certain writ of our said lord the king issued out of the said court upon the said judgment, to cause the said John Doe, as lessee of the said R. D. Chantrell, to have full possession then to come (among other things) of and in the said demised premises, with the appurtenances as aforesaid, and thereupon the defendant, being so tenant in possession of the said demised premises with the appurtenances as aforesaid, afterwards and before any part of the said rent became due from the defendant to the plaintiffs, to wit, on the 5th August, 1831, in &c., *was by force of that writ put out, amoved, and evicted from the said demised premises in the said declaration mentioned;* whereby the term of years in the indenture of lease in the declaration mentioned from thenceforth wholly ended and determined.

The replication was the same as ante, Vol. 4, p. 676. The defendant demurred generally to the replication; and the plaintiff joined in demurrer.

Mr. *W. H. Watson*, in support of the demurrer.—The plea shews that the lessors had a defeasible title, and that the lessee has been evicted; therefore no action will lie on the covenant for payment of rent; for, rent, being accessory, ceases on the determination of the lease. If the trade carried on by the defendant is not within the protection of the license, he may be liable to the lessors for damages; but not to an action for rent, that being extinguished—Viner's Abridgment, title "Rent," (Z)—Bacon's

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Abridgment, " Rent," (L). The replication merely se out the license in hæc verba: it should have express traversed or confessed and avoided the matters alleged the plea. Assuming, as will probably be contended the other side, that the proviso in the license reserves t defendant's liability generally to the whole covenants of t lease, still the action should have been assumpsit upon t agreement—*White* v. *Parkin* (c), *Thompson* v. *Brown* (*Cooke* v. *Jennings* (e).

Mr. *Barstow*, contra.—The objection to the plea that no cause of eviction is stated therein: the argum on the part of the defendant assumes that there w cause. The plea is not sufficient to entitle the defend to raise the question, inasmuch as it does not shew t the party evicting had lawful right to evict. In *Jordan Twells* (f), in debt on a covenant contained on an ind ture of lease, the defendant pleaded, "that, after maki the lease and before any rent became due and payable, o K. P., after making the said indenture, having a prior a better right and title to the premises than had been grant to the defendant, against his will entered into the premis

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you shew that the title of the evictor was not derived from the plaintiff himself." Here, the plea does not allege that the prohibited trade was carried on without the license or consent of the original lessors: it states that by reason of the mere fact of the carrying on the trade, the heir of the lessor evicted the defendant. A party who sets up a forfeiture is bound clearly to shew the cause of forfeiture. [The Court suggested to Mr. *Watson* that he might if he thought fit amend his plea in this particular. He, however, declined to do so.] *Jones* v. *Thorne* (*g*) is an authority to shew how strictly forfeitures of this description are construed.—At the time of the lease of 1815 was granted, the trade of a retail brewer did not exist; it was first established by the statute 4 Geo. 4, c. 61, and has since been made the subject of various legislative provisions (*h*). [Lord Chief Justice *Tindal*.—Does not the plea aver that the trade of a retail brewer and of a retailer of beer is one and the same? and might you not have traversed that allegation?] There was no necessity for a traverse of that allegation of fact: there is nothing for a jury to try.—Besides, even if the defendant has on this plea shewn a good cause of eviction by the superior landlord, he is not excused from the payment of rent—the eviction being occasioned by his own act. It may be conceded, that, if the eviction were lawful, the rent would be extinguished.

Mr. *Watson*, in reply.—It is alleged in the plea, and not denied by the replication, that the business carried on upon the premises was that of a retailer of beer; and therefore the statutes referred to have no application to the case. Taking the whole record together, there is

(*g*) 3 Dow. & Ryl. 152, 1 Barn. & Cress. 715.
(*h*) See the statute 5 Geo. 4, c. 54—6 Geo. 4, c. 91—7 & 8 Geo. 4, c. 53—9 Geo. 4, c. 68—and 1 Will. 4, c. 64.

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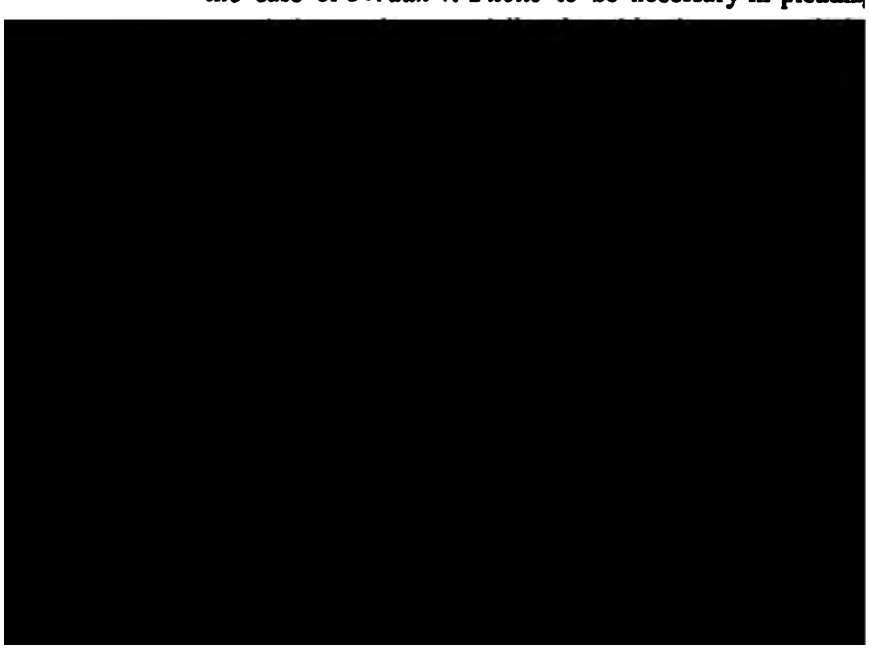
enough to enable the court to see that the eviction wa by a party having sufficient title, and that the busines was carried on without the licence or consent of the supe rior landlord: there could be no stronger proof of th absence of such consent than the fact of the ejectmer having been brought. It is sufficiently alleged generall that the evictor had right and title, and that he did ente it was not necessary to set out his title fully. The case *Jordan* v. *Twell* has been denied to be law, and is expres ly over-ruled by the cases of *Foster* v. *Pierson* (*h*), an *Hodgson* v. *The East India Company* (*i*).

Lord Chief Justice TINDAL.—The ground upon whic my judgment in this case is founded, renders it unnece sary for me to say much upon the other grounds that ha been argued before us. The principal question is wh ther an eviction is properly stated upon this plea. Th action is covenant for non-payment of rent. The tena in answer professes to set up an eviction by the superio landlord: and the question is whether that is the result o the facts stated on the record. Certainly it was held, i the case of *Jordan* v. *Twells* to be necessary in pleadin



that he evicted the plaintiff by legal process, &c.: and in the latter, that, in an action of covenant for quiet enjoyment, the plaintiff may state generally that A. B., lawfully claiming title under the defendant, entered, by virtue of such title, on the plaintiff, without setting forth the particulars of A. B.'s title. Perhaps a distinction may well be taken between the case of a plaintiff and that of a defendant—the latter being held to greater strictness. But it is not necessary to enter into that question upon the present occasion. Neither am I very much struck with the argument that has been urged, as to the difficulty that is thrown upon the tenant. It was his duty not to give up possession: he should have stood his ground and defended the ejectment, and then he would have known the title of the person who had turned him out. The ground of the eviction, as alleged in the plea, is this:—The defendant was in possession of the premises under a lease in which he has covenanted not to carry on certain trades therein enumerated "without the leave, license, and consent in writing of the plaintiffs, their executors, &c., first had and obtained. The plea then goes on to state that the plaintiffs, the lessors in that lease, held the premises under another lease containing the same covenants, dated the 21st December, 1815, granted by Robert Chantrell and Mary Ann, his wife, to one Stephen Ponder, the term and interest wherein, on the 8th July, 1830, came to the plaintiffs by assignment; that the plaintiffs, by a certain license or consent in writing did authorise and permit the defendant to use and exercise the trade of a retail brewer, that is to say, the business of a brewer and a retailer of beer, upon the said messuage, tenement, or dwelling-house in the declaration mentioned; that the defendant entered on the premises demised to him as aforesaid, and did then and there, after the said consent was so given as aforesaid, and before any of the rent in the declaration mentioned became due and payable, use, exercise, carry on,

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and follow the business of a retail brewer and of a retaile of beer on the demised premises; and that, whilst he wa in the possession and enjoyment of the said premises a aforesaid, and whilst he was so using, exercising, carryin on, and following the said trade of a retailer of beer on th demised premises as aforesaid, and by reason and on th ground that the defendant so carried on the said busine of a retailer of beer as aforesaid, and the forfeiture of th lease secondly above mentioned occasioned thereby, or Robert Chantrell, "having good right and title to th said demised premises, with the appurtenances, as elde son and heir-at-law to the said Mary Ann," brought a ejectment, and so evicted the defendant. The question i does the matter here set out disclose a breach of covenan and, if not, is there any general averment that the part evicting claimed right and title in the terms pleaded Let us see the language of the covenant. It is that th lessee, his executors, &c., shall not carry on certain speci fied trades "without the leave, license, and consent in writ ing of Robert Chantrell and Mary Ann, his wife, and th heirs and assigns of the said Mary Ann, in writing unde his, her, or their hands or hand, for that purpose first ha

sufficient right in the lessor to evict is shewn. But, it is said, the defendant may rely on the general allegation that the evictor had good right and title to enter. This seems to me to be a forced construction: the plea states, that, by reason and on the ground that the defendant so carried on the said business of a retailer of beer as aforesaid, and the forfeiture of the lease occasioned thereby, Chantrell "having good right and title," &c., evicted the defendant. This limits Chantrell's right to evict to the supposed forfeiture so alleged. Inasmuch, therefore, as the lessor entered for no justifiable cause, as appears by the record, and there is no general allegation of right and title in Chantrell to re-enter, nor any specific allegation of facts whence such right and title can be deduced, and the defect being a defect in title, and consequently not cured by pleading over, I think there ought to be judgment for the plaintiff.

Mr. Justice GASELEE.—My Lord Chief Justice has gone so fully into the question that I need say no more than that I entirely concur in the opinion he has delivered. But it seems to me that the plea contains no sufficient allegation that the defendant did carry on a trade that was prohibited by the lease. A retail brewer and a common brewer are not the same. The prohibited trades are those of a "common brewer, victualler, or retailer of beer, ale, or spirituous liquors." The plea avers a license from the plaintiffs authorising the defendant to exercise "the trade of a retail brewer, *that is to say, the business of a brewer and a retailer of beer.*" It is true the replication does not traverse that allegation: but it sets forth the license, which only authorises the defendant to exercise the trade of "a retail brewer" upon the premises. A party, when he comes to plead a license, has no right to extend the meaning of the words he finds in it. Although it is unnecessary, I cannot help saying that I by no means come to the con-

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clusion that the trade carried on upon the premises in question was one that the lease prohibited.

Mr. Justice VAUGHAN.—The question is whether on the face of the plea there is or is not alleged a sufficient cause of eviction. It is admitted that there is a general allegation that the party evicting had good right and title: and, unless there is a difference in this respect between such an allegation in a declaration and in a plea, the cases of *Foster* v. *Pierson* and *Hodgson* v. *The East India Company* do certainly in my opinion over-rule *Jordan* v. *Twell*. Lord Kenyon in *Foster* v. *Pierson*, says (*k*): "If the declaration be certain to a common intent, that is sufficient. Now, it states that J. B. Pierson, at the time of the lease made to the plaintiff, and at the time of the eviction, had lawful right and title to the premises; and, having such lawful right and title, entered &c. I think it would be doing violence to these words to say that the lawful right and title which it is stated he had did not legalise his entry: the fair import of the record is, that he had lawful right and title to do that which he did." Mr. Justice Ashhurst said: "The breach, though not accurately

Pierson." And Mr. Justice Grose referred to *Norman v. Foster* (*l*). That was an action of debt on a bond to perform covenants in a lease. One covenant was for quiet enjoyment, and the plaintiff assigned for breach, that a stranger entered *claiming title*, but not saying what title he had. Lord Chief Justice Hale said "Habens titulum at that time, would have done your business." So, Lord Kenyon, in delivering the opinion of the court, in *Hodgson v. The East India Company*, said (*m*): "We have since the argument looked into the case of *Foster* v. *Pierson*, which was relied upon as an authority in support of this declaration, and in which all the former cases were considered, and we are of opinion that the breaches here are properly assigned. If they were not, it would impose insuperable difficulties on the plaintiff; for, I do not know how it was possible for him to set forth the particulars of the titles of the persons who entered upon him: such knowledge could only be acquired by an inspection of title deeds to which he could have no access." I do feel considerable doubts in saying that this plea is not sufficient. The forfeiture could only arise on the carrying on one of the trades prohibited by the lease without license.

Mr Justice BOSANQUET.—The question is whether or not a legal cause of eviction is shewn upon the face of the record in this case. I am of opinion with my Lord Chief Justice and my Brother Gaselee that there is not. The plea professes to set out the grounds on which the eviction took place. [The learned judge here stated the substance of the plea.] Does this plea or does it not sufficiently aver a legal ground of eviction? It is perfectly clear that the mere averment of the fact of the defendant having carried on the business of a retailer of beer on the demised premises, is not in itself enough to shew a ground of for-

(*l*) 1 Mod. 101. (*m*) 8 Term Rep. 283.

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feiture: it must also be shewn to have been done witho a license from the lessor. The proviso as to the licen is contained in the clause creating the prohibition; a therefore, according to the rules of pleading, the exce tion should have been negatived. It has been argued th it was sufficient in the plea to state generally that t evictor had good right and title; and that there is a go averment to that effect. But, the cause of the evicti being expressly stated, the general words cannot had resort to. The allegation that "Robert Chantre having good right and title to the demised premises, wi the appurtenances, as eldest son and heir at law to t said Mary Ann, &c.," amounts to no more than this, v to put Robert Chantrell in the place of Mary Ann, It to be observed that this allegation is contained in a pl *Foster* v. *Pierson* and *Hodgson* v. *The East India Co pany* were cases of declarations upon covenants for qu enjoyment. There is always greater certainty and pre sion required in a plea which seeks, as this does, to d feat a title, than is required in a count. I am not by a means prepared to say that the two cases I have mention necessarily over-rule the case of *Jordan* v. *Twell:* b

[redacted]

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Tuesday, Nov. 18th.

Quære whether an attorney of the King's Bench sued by writ of summons in this court, can plead his privilege in abatement?

At all events such plea must be verified by affidavit, or the plaintiff may treat it as a nullity, and sign judgment.

DAVIDSON *v.* CHILMAN.

THE defendant, an attorney of the court of King's Bench, being sued in this court by writ of summons, pleaded in abatement his privilege as such attorney. No affidavit accompanied the plea. The plaintiff, treating the plea as a nullity, signed judgment.

Mr. Serjeant *Talfourd*, on a former day obtained a rule nisi to set aside the judgment for irregularity.

Mr. Serjeant *Wilde* shewed cause—By the 1st section of the 2 Will 4, c. 39, after a recital that the process for the commencement of personal actions in superior courts of law was, by reason of its great variety and multiplicity, very inconvenient in practice, it is enacted "that the process in all such actions, in cases where it is not intended to hold the defendant to special bail, or to proceed against a member of parliament according to the provisions of the 6 Geo. 4, c. 16, shall, whether the action be brought by or against any person entitled to the privilege of peerage, or of parliament, *or of the court wherein such action shall be brought, or of any other court*, or to any other privilege, or by or against any other person, be according to the form, &c., and which process may issue *from either of the said courts*, and shall be called a writ of summons." This section abolishes the old mode of proceeding by bill against, or by attachment, or capias of privilege at the suit of, attornies and officers of the courts, in all cases to which the writs authorised by the statute are applicable.—The plea being unaccompanied by an affidavit verifying it, was clearly a nullity. The rule is thus stated by Mr. Tidd (*a*): "An affidavit should be annexed to the plea [in abatement], stating that it is true in substance and matter of

(*a*) Tidd's Practice, 9th edit., p. 640.

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DAVIDSON v. CHILMAN.

fact: and, if the plea be not filed in due time, or there be no affidavit annexed of the truth of it, or a defective affidavit, the plaintiff may consider it as a nullity, and sign judgment; or he may move the court to set it aside."

Mr. Serjeant *Talfourd*, in support of his rule.—It may be considered that the statute 2 Will. 4, c. 39, has altered the mode of proceeding by and against attornies and officers of the courts: but there is nothing in the act to deprive them of the privilege of being sued in their own court, a privilege accorded to them for the convenience of their clients.—At all events, the want of an affidavit, if an affidavit were necessary, does not render the plea such a nullity as to warrant the plaintiff in signing judgment.

PER CURIAM.—Without an affidavit of verification, the plea was clearly a nullity. It is a plea to the jurisdiction of the court, which forms one of the subdivisions of pleas in abatement. The plaintiff therefore had a right to sign judgment.

Rule discharged (*b*).

1834.

Tuesday, Nov. 18th.

The 8th rule of Hilary Term, 4 Will. 4, as to pleas of judgment recovered, does not apply to a plea by an executor of judgments recovered against the testator, whereby the assets are absorbed.

His majesty's warrant for opening the court of Common Pleas virtually abrogates the rule requiring pleas, &c. to be signed by a serjeant.

POWER *v.* IZOD, Executor, &c.

BY the 8th rule of Hilary Term, 4 Will. 4, it is ordered, that, "where a defendant shall plead a plea of judgment recovered in another court, he shall in the margin of such plea state the date of such judgment, and, if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and, in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court or a judge." The defendant in this case, being sued in his representative character, pleaded judgments recovered beyond the value of the assets to be administered. The numbers of the rolls on which these judgments were entered, were not stated in the margin of the plea; neither was it signed by a Serjeant. The plaintiff thereupon signed judgment as for want of a plea.

Mr. Serjeant *Wilde*, on a former day, obtained a rule nisi that this judgment might be set aside for irregularity, with costs. He submitted that a plea of this description, not being what is understood by the technical term, a plea of judgment recovered, was not within the meaning of the rule: the judgments mentioned in the plea being merely stated as matter of inducement to shew that there were no assets.

Mr. Serjeant *Bompas* shewed cause.—He contended

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POWER v. IZOD.

that the rule in question was wide enough in its terms comprehend the case of a plea like the present, which there could be no pretence for saying was not within the mischief intended to be remedied by it.—With respect to the second point, he submitted, that, unless the warrant of his majesty for opening this court (*a*) to the bar operated a revocation of the old rule of court requiring pleas of this description, to be signed by a Serjeant, the plea was informal in this respect, and the judgment regular.

Lord Chief Justice TINDAL.—It is very possible that the rule referred to is not conceived in terms sufficiently comprehensive. But I cannot bring myself to suppose that the language of the rule warrants the construction that we are called on to put upon it; it could not have been intended to apply to a plea like this.—As to the other point, I think his majesty's warrant does sufficiently override our rule with respect to the signature of papers by serjeants: it orders and directs "that the right of practising, pleading, and audience in our said court of Common Pleas shall, upon and from the first day of Trinity Term, 1834, cease to be exercised exclusively by the serjeants at law; and that upon and from that day our com-

intended to apply to a case like the present.—On the other point I agree with the Lord Chief Justice.

The rest of the Court concurring—

Rule absolute, with costs.

ROGERS *v* PECKHAM, a Prisoner.

Thursday, Nov. 20th.

A motion to bring up a prisoner under the compulsory clauses of the lords' act, cannot be made after the expiration of the first seven days of the term.

MR. *CRIPPS* moved that the defendant, a prisoner in execution in the Fleet Prison, might be brought up under the compulsory clauses of the lords' act, 32 Geo. 2, c. 28, ss. 16, 17.—He admitted, that, according to the case of *Acraman* v. *Harrison* (*a*), his application appeared to be too late: but he attempted to contend that the words of the act did not warrant the construction there put upon them, the words "within the first seven days of the term which shall next ensue the expiration of the said twenty days" (the twenty days' notice required by a preceding part of the 16th section) being satisfied by the motion being made at any period of the term, provided seven days *in term* had not been suffered to elapse since the expira- of the notice.

Lord Chief Justice TINDAL.—Considering the highly penal nature of the act, which renders the insolvent liable, in case of refusal to deliver into court a schedule of his estate and effects, to be transported, I think we ought to adhere to the strict construction that has already on more occasions than one been put upon those words, and which certainly seems to me to be the true grammatical construc-

(*a*) Ante, Vol. 1, p. 240, 8 Bing. 154.

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ROGERS v. PECKHAM.

tion. This will be the safer course; for there is n to prevent the application being renewed within tl seven days of the next term (*b*).

The rest of the Conrt concurring—

Rule refused

(*b*) *Nicholls* v. *Neilson*, 2 Marsh, 200, 6 Taunt. 493. *Vaughan* v. *Burrell*, 4 Term Rep. 367. *Rex* v. *Ipswich* (Bailiffs), 7 East, 84, 3 Smith, 102. And see *Pearce* v. *Taylor*, 4 Term Rep. 231. *Rex* v. *Wakefield*, 13 East, 190. *In re Jones*, 2 Chitt. Rep. 226. But see *Thornton* v. *Dunphy*, 1 Hen. Blac. 181. *Orchard* v. *Thomas*, 1 Chitt. Rep. 220.

(*c*) And see *Langdon* v. *l* M'Clel. 6, 13 Price, 186 was cited and relied on Justice Alderson, in *Acr Harrison*. — *Haywood* v. ante, Vol. 3, p. 388, is als thority in point; for it w held that the twenty days must expire *before the firs* the term in which the pri brought up.

Thursday, Nov. 20th.

To assumpsit for work and

MOORE *v.* BOULCOTT.

THE plaintiff declared that the defendant was inc to him in the sum of 20*l.* for the work and labour

that the plaintiff commenced the action against her for the recovery of such bill of fees before the expiration of one month after the delivery of his said bill of fees to her the defendant (she the defendant being the party to be charged therewith), contrary to the form of the statute in such case made and provided; and this, &c.

Replication—that the action was not brought by the plaintiff against the defendant to recover from her the defendant the amount of a bill of fees for the work and labour, care, diligence, journies, and attendances of the plaintiff by him bestowed as the attorney and solicitor of and for the defendant, at law *and* in equity, modo et forma, &c.

Demurrer, assigning for cause that the replication alleged that the action was not brought for the amount of a bill of fees for the work, &c. of the plaintiff as the attorney *and* solicitor of and for the defendant, at law *and* in equity, whereas it ought to have alleged that the action was not brought for the amount of a bill of fees for the work &c. of the plaintiff as the attorney *or* solicitor of and for the defendant, at law *or* in equity (*a*). Joinder.

Mr. *Whitmore*, in support of the demurrer.—The plaintiff in his replication does not allege that a bill of fees was delivered; he merely denies that the business done was

(*a*) The following further causes of demurrer were also assigned, but were not noticed in the argument. That the replication tended to raise an immaterial issue, inasmuch as if the defendant should join issue thereon and it should appear at the trial that the bill of fees contained charges for fees at law, though not for any fees &c. in equity, such issue must be found for the plaintiff, although it would be manifest that he had not complied with the statute, and therefore had no right of action: and also that the replication was a departure from the declaration—the latter alleging that the business was done as the attorney and solicitor of the defendant (which must legally mean business at law or in equity)—the former alleging the reverse.

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such that by the statute a bill was required to be delivere but, in this denial, he does not follow the words of *t* statute, which enacts that no attorney, &c. shall commen or maintain any action or suit for the recovery of any fee &c., at law *or* in equity, until &c. He ought to have tra versed in the alternative. A traverse must not be to large. Thus, in *Colborn* v. *Stockdale* (*b*), to debt on bond conditioned for the payment of 1,550*l.* the defe dant pleaded that part of the money mentioned in the co dition, scilicet 1500*l.*, was won by gaming, contrary to t statute, per quod the bond became void; the plaintiff r plied that the bond was given for a just debt, and travers that the 1500*l.* was won by gaming contra formam statu modo et forma as the defendant had pleaded. On d murrer, the replication was held ill. Per Curiam—" The is no colour to maintain the replication: the material pa of the plea is, that part of the money for which the bo was given was won by gaming, and the, *scilicet, so muc* is only matter of form, of which no notice should be tak in the replication." So, in *Goram* v. *Sweeting* (*c*), whe in assumpsit, the plaintiff declared that the ship, tack &c., were sunk and destroyed; it was held, that, if the d

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in the disjunctive it would have been bad. In *Wood* v. *Budden* (*e*), the plaintiff brought trespass against the defendant, and declared in the new assignment in a close of pasture in Tallard Royall. The defendant pleaded that William, Earl of Salisbury, was seised as in fee and right of an ancient close, replenished with deer, called Cranborn, and so prescribed in liberty of chase, and that the same chase did extend itself as well in and through the said eight acres of pasture as in and through the said town of Tallard Royal, and justified the trespass for use of the chase. The plaintiff traversed that the chase doth not extend itself as well to the eight acres as to the whole town. The issue having been found for the plaintiff, it was contended in arrest of judgment, that the issue and verdict were faulty, because if the chase did not extend to the right acres only it was enough for the defendant, and therefore the finding of the jury that it did not extend as well to the whole town as to the eight acres, did not conclude against the defendant's right in the eight acres, which was only in question. But it was answered by the Court that "there was no fault in the issue, much less in the verdict (which was according to the issue); but the fault was in the defendant's plea that now takes the exception, for he puts in his plea more than he needed, viz. the whole town, which being to his own disadvantage, and to the advantage of the plaintiff, there was no reason for him to demur upon it, but rather to admit it as he did, and so to put it in issue." Here, the circumstances were within the defendant's own knowledge, and it was in his power to raise the issue properly.

Lord Chief Justice TINDAL.—It appears to me that the replication affords no answer to the plea. The statute

(*e*) Hob. 119.

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enacts that "no attorney or solicitor shall commence maintain any action or suit for the recovery of any fe charges, or disbursements, at law *or* in equity, until t expiration of one month or more after such attorney or s licitor shall have delivered unto the party or parties to charged therewith a bill of such fees, charges, and d bursements, &c." It appears therefore, that, if the l for which the action is brought contains charges in resp of a suit either at law or in equity, the delivery of a sig bill is necessary. Now, the plea alleges that the bill which the action is brought contains charges for busin in law *and* in equity. The plaintiff was bound to pu himself from the objection by shewing in his replicat that the bill on which he sued was not a bill within meaning of the statute, by alleging that it neither conta ed charges in law nor in equity. Without the aid of authorities, I think the replication insufficient.

Mr. Justice GASELEE.—The replication should h shewn that the bill was not taxable: instead of that, plaintiff merely traverses that it is taxable both in law a in equity.

[redacted]

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Monday, Nov. 25th.

A fiat in bankruptcy issued against the defendant on the petition of the plaintiff. After the fiat, and before the choice of assignees, the plaintiff obtained from the bankrupt his acceptance for part of his debt. The plaintiff was afterwards chosen one of the assignees, and the defendant obtained his certificate: —Held, that it was not competent to the plaintiff to sue upon the bill; the security being void, both as being contrary to the policy of the bankrupt law generally, and contrary to the spirit of the 8th section of the 6 Geo. 4, c. 16.

Rose *v.* Main.

THIS was an action of assumpsit by the drawer against the acceptor of a bill of exchange. At the trial before Lord Chief Justice *Tindal*, at the Sittings at Westminster after the last Term, it appeared that the bill in question was obtained by the plaintiff under the following circumstances:—The defendant became bankrupt on the 1st November, 1832, the fiat being issued against him on the petition of the plaintiff. On the 12th the plaintiff proved under the commission for the whole debt due to him, and on the 17th obtained from the bankrupt his acceptance for 70*l.*, part of the debt so proved, and was afterwards chosen one of the assignees. The defendant had since obtained his certificate.

On the part of the defendant it was contended that the plaintiff was not entitled to recover upon the bill, the transaction being contrary to the policy of the bankrupt laws. A verdict having been found for the plantiff for the amount of the bill, with a reservation of leave to the plaintiff to move to enter a nonsuit.

Mr. *Kelly*, on a former day, obtained a rule nisi to that effect.—By putting this bill in suit, the plaintiff is in effect suing for a demand proveable, and actually proved, under the fiat, and from which the defendant's certificate discharges him. In *Brix* v. *Braham* (*a*), where a bankrupt, after the issuing of a commission against him, but before obtaining his certificate, promised a creditor *who had not proved under the commission* to pay him the whole of his demand notwithstanding his bankruptcy, and indorsed a bill of exchange to him for that purpose—it was held that the certificate was no bar to an action brought on the bill,

(*a*) 8 J. B. Moore, 261, 1 Bingh. 281.

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the debt due before the bankruptcy being a good conside-
tion for the promise, which would have been available ev
after the certificate had been obtained. But in th
as in all the other cases to be found in the books,
proving for his debt, the plaintiff elected to take t
benefit of the fiat. The 59th section expressly declar
that " the proving or claiming a debt under a commissio
by any creditor shall be deemed an election by such cr
ditor to take the benefit of such commission with respe
to the debt so proved or claimed." The 131st sectio
clearly was not intended to apply to transactions occurri
before the bankrupt has obtained his certificate. Her
an interest is given to the petitioning creditor in direct o
position to his duty: it is a secret dealing with the ban
rupt whereby a portion of his effects is withdrawn from t
general body of the creditors; and therefore it is contra
to the policy of the law, and the security thus obtain
cannot be made the foundation of an action as betwe
these parties.

Lord Chief Justice Tindal.—I am of opinion that t
rule should be made absolute. Independently of the g
neral ground of objection urged on the part of the defe

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Monday, Nov. 25th.

A fiat in bankruptcy issued against the defendant on the petition of the plaintiff. After the fiat, and before the choice of assignees, the plaintiff obtained from the bankrupt his acceptance for part of his debt. The plaintiff was afterwards chosen one of the assignees, and the defendant obtained his certificate: —Held, that it was not competent to the plaintiff to sue upon the bill; the security being void, both as being contrary to the policy of the bankrupt law generally, and contrary to the spirit of the 8th section of the 6 Geo. 4, c. 16.

ROSE *v.* MAIN.

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On the part of the defendant it was contended that the plaintiff was not entitled to recover upon the bill, the transaction being contrary to the policy of the bankrupt law. A verdict having been found for the plaintiff for the amount of the bill, with a reservation of leave to the plaintiff to move to enter a nonsuit—

Mr. *Kelly*, on a former day, obtained a rule nisi to that effect.—By putting this bill in suit, the plaintiff is in effect suing for a demand provable, and actually proved, under the fiat, and from which the defendant's certificate discharges him. In *Brix* v. *Braham* (*a*), where a bankrupt, after the issuing of a commission against him, but before obtaining his certificate, promised a creditor *who had not proved under the commission* to pay him the whole of his demand notwithstanding his bankruptcy, and indorsed a bill of exchange to him for that purpose—it was held that the certificate was no bar to an action brought on the bill, the debt due before the bankruptcy being a good consi-

(*a*) 8 J. B. Moore, 261, 1 Bing. 281.

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deration for the promise, which would have been availa[redacted]b even after the certificate had been obtained. But, in th[redacted]at as in all the other cases to be found in the books, the pa[redacted]ty receiving the bill or other security was neither petitioni[redacted]ng creditor nor assignee. Considering how much power the petitioning creditor has over the proceedings at their commencement, it is manifestly contrary to the policy of the law that he should be permitted to negotiate secretly with the bankrupt for his own benefit.

Mr. *Barstow* shewed cause.—There is no foundation for this motion. It assumes that it is not competent in point of law for a bankrupt to give or for a creditor to take a security for a debt proved or provable under the commission, during the interval between the bankruptcy and the certificate. No authority goes this length. Neither does the fact of the party obtaining such security happening to be the petitioning creditor, make any difference. The 131st section of the 6 Geo. 4, c. 16, evidently contemplates the legality of such transactions: it provides "that no bankrupt, after his certificate shall have been allowed under any present or future commission, shall be

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degree affect the funds to which his creditors were entitled under the commission; for, it could not be enforced until the bankrupt had obtained his certificate.

Mr. *Kelly*, in support of his rule.—To permit transactions of this nature will be to defeat the principal object of the bankrupt laws. By proving for his debt, the plaintiff elected to take the benefit of the fiat. The 59th section of the 6 Geo. 4, c. 16, expressly declares that "the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed." The 131st section clearly was not intended to apply to transactions occurring before the bankrupt has obtained his certificate. Here, an interest is given to the petitioning creditor in direct opposition to his duty: it is a secret dealing with the bankrupt whereby a portion of his effects is withdrawn from the general body of the creditors; and therefore it is contrary to the policy of the law, and the security thus obtained cannot be made the foundation of an action as between these parties.

Lord Chief Justice Tindal.—I am of opinion that this rule should be made absolute. Independently of the general ground of objection urged on the part of the defendant, that the dealing between the bankrupt and the petitioning creditor puts the latter in a situation in which his interest and his duty are opposed to each other, which affords a very strong presumption that the transaction is at variance with the object and policy of the law; it appears to me that there is another ground for saying that this action cannot be maintained; for, I am of opinion, upon the construction of the 8th section of the 6 Geo. 4, c. 16, which has not been adverted to in the course of the argument, that there is a clear demonstration on the part of the legislature that a security obtained under the circumstances appearing in this case is invalid. That section enacts

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"that, if any trader liable by virtue of this act to become bankrupt, shall, *after a docket struck against him*, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction, or security shall be an act of bankruptcy; and, if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy: and every person so receiving such money, gift, delivery, satisfaction, or security aforesaid, shall forfeit his whole debt, and also re-pay or deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint, for the benefit of the creditors of such bankrupt." This section contemplates the obtaining by the petitioning creditor a security of some sort in the interval between the striking the docket [illegible] the commission. In the present case, the [illegible] after the fiat issued, [illegible] to me

clusion, as the plaintiff may, if he be dissatisfied with our determination, put the question in a train for a fuller discussion by writ of error or by tendering a bill of exceptions.

Mr. Justice GASELEE.—I am of the same opinion. Independently of the 8th section of the 6 Geo. 4, c. 16, it appears to me that the whole policy of the bankrupt law is opposed to this transaction. The assignee is to take care that the property that comes to his hands is fairly divided amongst the creditors who have proved under the commission. Here, the first act the party does, is, to secure something for himself. But the section above referred to puts the question beyond all doubt. I entertain a strong impression, that, under some of the older acts of parliament relating to bankrupts, the petitioning creditor was bound to prove his entire debt under the commission, and had no right of election.

Mr. Justice VAUGHAN.—I am of the same opinion. I think we should be committing a gross fraud on the spirit of the act if we entertained any doubt upon the subject. The plaintiff is placed in a double trust—he is the petitioning creditor, and also one of the assignees. If under these circumstances he might receive security for his debt, he would be left without a motive for the due discharge of his duty. *Brix* v. *Braham* is a very different case from the present. All that was there decided was, that a common creditor, who had not proved for his debt under the commission, was at liberty, after the bankrupt had obtained his certificate, to enforce payment of a bill indorsed to him by the bankrupt before the certificate. The same point had been before determined in *Roberts* v. *Morgan* (*b*) and in *Birch* v. *Sharland* (*c*). The question is whether this transaction is not contrary to the principles and policy of the law. To shew that it is so, nothing can

(*b*) 1 Esp. Rep. 736. (*c*) 1 Term Rep. 715.

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be more strong than the section of the bankrupt act which my Lord Chief Justice has referred. I think it is possible that payment of this bill can be enforced.

Mr. Justice BOSANQUET.—Our decision upon this oc casion will not at all interfere with *Brix* v. *Braham*, o any of the other cases. The plaintiff was petitioning cre ditor and also assignee. The fact of the security havin been obtained before the choice of assignees makes n difference in the plaintiff's favour. Up to the time of th choice of assignees, the petitioning creditor has the co duct of the commission. The plaintiff's duties, therefor at the time he took the security were precisely of the sam nature as they would be after he became assignee. Th obtaining the security was an act equally at variance wi his duty, whether it took place before or after he was a pointed assignee. It is said that the security in questic being personal, it could have no operation upon any fun that the creditors would be entitled to avail themselves o But, at least, the effect of it is to give to the petitionin creditor an advantage in preference to the rest of the cr ditors; and it is therefore void on the same principle th

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Monday, Nov. 18th.

GIBBENS and Others *v.* BUISSON and Another.

By a charter-party, it was agreed that the ship should proceed with a certain cargo from London to Oporto; and, should the master think it possible to enter the port, without risk from the batteries (then in possession of Don Miguel's forces on both banks of the Douro), the cargo was to be discharged there; if not, the master was to proceed off the castle of the Foz, or to some other point near the bar, where the vessel could lie in safety, and there discharge into boats, which the freighters were to bring alongside the vessel. Freight to be paid, in full for the voyage, 475*l.*, or, *if the vessel could enter Oporto, discharge, and reload there*, then the sum of 300*l* only. Twenty-five working days to be allowed for unloading the cargo: the lay days to commence when the ship was off the castle of the Foz, or other point where she was to be discharged, continue whilst there, cease if blown off the coast by stress of weather, and recommence when at anchor at her station: 4*l.* per day demurrage over and above the said laying days. The ship arrived off the bar of Oporto on the 3rd June, but, by reason of the Miguelites being in possession of the batteries on either side of the river, it was not possible for her to enter the port without great danger, and she was accordingly brought up in the roads off the castle of the Foz. By the 29th June (when the laying days ended), a small portion only of the cargo had been discharged, the vessel remaining in the roads for the convenience and at the request of the defendants' agent. The ship continued on demurrage down to the 29th August, having in the interim been blown off the coast and prevented from returning to her anchorage for seven days, and having on the 26th entered the harbour. Seven-eighths of the cargo were discharged outside the bar, the residue in the harbour. The master there obtained a home cargo:—Held, that the plaintiffs' right to the larger freight attached on the expiration of the twenty-five laying days, the vessel being then unable to enter the port; and also that they were entitled to demurrage from the 28th June to the 29th August—including two Sundays, on which the discharge had proceeded.

THIS was an action of assumpsit brought to recover the sum of 248*l.*, in which the plaintiffs declared upon the charterparty of the ship Lusitania hereinafter set out, with counts for the carriage and conveyance of passengers, stock, and merchandize, for the use and hire, and for the detention of the ship, &c. The defendants pleaded the general issue, and paid into court 73*l.* upon the count for the use and hire of the ship. The following case was submitted for the opinion of the Court:—

The plaintiffs were, on the 2nd of May, 1833, and have ever since continued, owners of the ship or vessel called the Lusitania mentioned in the declaration in this cause, and on that day a charterparty, of which the following is a copy, was duly signed by the plaintiffs and defendants:—

"London, 2nd May, 1833.

"Memorandum of charterparty.—It is this day mutually agreed between William Gibbens, owner of the good ship or vessel called the Lusitania, Samuel Gibbens, master, of the burthen of 175 tons or thereabouts, now in the port of London, and Messrs. Buisson & Morlet, of London, merchants, that the said ship, being tight, staunch,

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GIBBENS v. BUISSON.

and strong, and every way fitted for the voyage, sl
ceive on board a full and complete cargo of merch
including a boat or lighter, to be carried on deck, a
ceed therewith to Vigo, and there further receive o
as much live stock as he can with safety to the ves
on deck, coops and pens and all other requisites
live stock to be provided by the freighters; all wh
said merchants bind themselves to send alongside
expense, and which the said master in like mann
be bound to receive and stow on board the said v
his expense in the usual manner, according to the
of the port, not exceeding what she can reasonab
and carry over and above her tackle, apparel, pro
and furniture; and, being so loaded, shall therewi
ceed to Oporto; and, should the master think it
to enter the port without risk from the batteries, he
to discharge the cargo there; but, if not, he binds
to proceed off the castle of the Foz, or to som
point near the bar, where the vessel can lie in safe
there discharge into boats which the freighters bin
selves to send alongside the vessel. To be paid fr
full for the voyage the sum of 475*l.*, or, if the ves

[redacted]

where she is to discharge, continue whilst there, cease if blown off the coast by stress of weather, and recommence when again at anchor at her station: 4*l.* per day demurrage for every day over and above the said laying days: penalty for non-performance of this agreement, 600*l.* The master to sign bills of lading in the usual manner, and (if required) for more or less freight than above stipulated, without prejudice to this charterparty. The vessel to be consigned to the freighters or their agents at the ports of loading and unloading. Five clear days are to be allowed the freighters for taking in the live stock at Vigo; and 4*l.* per day demurrage to be paid for every day she is kept longer. Should there be an absolute impossibility of landing the cargo off Oporto, it shall be lawful for the master and the freighters' agents to enter into a fresh agreement, without prejudice to this charterparty."

On the 12th of May, 1833, the said ship Lusitania sailed from London on the voyage mentioned in the charterparty and declaration, with a cargo chiefly of provisions shipped by or on account of the defendants, and arrived on the 28th at Vigo, where some oxen, sheep, and goats, and some dry provisions, were also taken on board; and the ship sailed from Vigo on the 2nd day of June, and arrived off the bar of Oporto on the next day. The harbour of Oporto is about two or three miles up the river Douro; and, when the ship so arrived, the Miguelites were in possession of batteries on each side of the entrance of that river, and it was not then possible for the ship to enter the port without great risk and danger, and the ship was accordingly brought up in the roads off the Castle of the Foz, just beyond the range of the Miguelite batteries. In pursuance of instructions from the plaintiffs, the captain made a private signal to inform Signor Dourado, of Oporto, to whom the cargo was consigned by the defendants, of the arrival of the ship; and the captain shortly

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afterwards received a letter from Signor Dourado, of which the following is a copy:—

"Oporto, 3rd June, 1833.

"I am very happy to learn of your safe arrival. I send the boats to bring in the first place the oxen, pigs, sheep, fowls, and the onions, you may have received at Vigo; and, if, after receiving these, you can send by them any thing else, you must begin by the flour, and send such quantity as can come. You must not deliver any of your cargo to the boats without the masters of them presenting to you a note from me, a note equal to the inclosed; and they must bring on their return such as I also inclosed send you, signed by yourself, and declaring in the margin the quantities or volumes sent by each of them. All these measures are necessary to avoid the many robberies that are committed, and all vigilance is necessary. I send the master and men to take charge of the boat you bring out, with the two hundred oars; this in case you find that the boat can safely come; and to this purpose the carpenter takes with him pitch, flax, &c.

"B. da C. Dourado."

The ship remained at anchor in the roads, and deli-

ɔut he brought her up again in the same anchorage next morning, and remained there until the 18th ɡust, when, it blowing hard, a ship under French ı parted from her anchor and drove against the nia, and the captain was obliged to slip his chain o get out of the way. The Lusitania was driven : another ship and sustained some damage, and she ood out to sea in order to avoid further danger, on board about one-eighth of the cargo undis- d. The gale continued for several days, and the nia was beating off and on the coast and could not to her former anchorage until the 25th of August. liguelites had then abandoned the batteries, and er was open, but there was not then sufficient wind le to enable the ship to cross the bar. The next ıignal was hoisted that there was sufficient water to he ship to get over the bar; and the Lusitania pro- up the river and came to anchor in the harbour ırto, where the residue of the cargo was delivered order of Signor Dourado as hereinafter mentioned. ɔr about the 26th of June, a letter was received by ɔtain from Signor Dourado, of which the following ɔy:—

" Oporto, 26th June, 1833.

ıave already acknowledged the receipt of your let- he 21st inst., to the contents of which I now answer. ɔve the expenses you have been at with feeding the nployed in unloading and bringing over your cargo, I beg you to continue doing until we can settle ac- . In spite of my best endeavours, it has not been e to hurry on more than has been done the unload- [shall continue with my utmost exertions towards clusion; and am with regard,

" B. da C. Dourado."

ı a small part of the outward cargo was discharged the 29th; and at the request of Signor Dourado the

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ship continued to lay in the roads and to discharge her cargo from time to time as it was sent for by Signor Dourado. On or about the 15th of July, a letter was received by the plaintiff William Gibbens (who was on board the Lusitania) from Signor Dourado, of which the following is a copy:—

"Oporto, 15th July, 1833.

"We have avoided unloading your vessel owing to the low prices of the articles, and our warehouses being full: however we send these boats to bring all the barrels of beef they can, and nothing else but these; but, if it is absolutely necessary to take out some barrels of flour, then let the lesser possible quantity come; but mind to send as much beef as is at hand, and arrange matters so that it may be brought on shore to-morrow.

"B. da C. Dourado."

The sum of 100*l.* was on the 9th May, 1833, paid by the defendants to the plaintiffs in part of the freight of the ship; and, on the 24th July, Captain Gibbens applied on behalf of the plaintiffs to Signor Dourado, and claimed the payment of the balance of freight for the said ship, as having previously become due, according to the terms of the charterparty, which was then referred to; and

ed it for payment, and received the amount there-
the defendants.

he 16th August, Captain Gibbens applied to Signor
lo, and pressed him to discharge the ship; when
Dourado said the prices were so low that he did
h to pay the extra expenses of boats. Signor Dou-
is then informed by the captain that the ship had
ı demurrage ever since the 28th of June, which he
d; and it was calculated by Signor Dourado and
tain that there was the sum of 200*l.* due for fifty
murrage; but this the captain afterwards found to
stake, and that only forty-nine days were then due.
time the ship entered the harbour, she had only
ne-eighth of her cargo left on board, and the
f that, except as after mentioned, was delivered in
bour between the 26th and 29th of August, inclu-
ne hundred and eighty oars, which had been sent
he ship by the defendants, could not be disposed
porto, and, at the request of Signor Dourado, the
agreed to take them back to England without any
; but it was necessary, in order to clear the ship at
tom-House of Oporto, that these oars should be
which was done, by order from Signor Dourado,
30th August, and a barrel of flour which had be-
caped notice was also landed on the 30th August,
ship was then cleared at the Custom-House, and

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memorandum on the back of a copy of the charter, of which the following is a translation:—

"Arrived off the bar on the 3rd of June—the time of contract expired on the 28th ditto—entered the river on the 26th of August, and was cleared on the 30th August.

(Signed) "B. da C. Dourado."

The Lusitania afterwards obtained a full cargo at Oporto for England, which she began to take in on the 19th of September, and sailed therewith on the 6th of October following. On the 14th of September, 1833, Captain Gibbens wrote Signor Dourado a letter, demanding 248*l.* for demurrage, being the amount payable for sixty-two days, at 4*l.* per day. Some further correspondence took place between Dourado and Captain Gibbens, which is not material to the present inquiry; each party giving his opinion upon the construction of the charterparty; and the former eventually referring Gibbens to the defendants for the adjustment of his demand.

In the declaration, which was to be considered as part of the case, the plaintiffs, after setting out the substance of the charterparty, and averring that the ship, being tight, &c., received the cargo on board, stated that she

[redacted]

tated in the case, to recover any and what sum from the lefendants, and upon what count or counts; the defenlants being at liberty to object to the admissibility of the vidence of Dourado as to the declarations and letters tated in the case. The Court to be at liberty to give udgment for the plaintiffs if they should think there was ufficient evidence to support the plaintiffs' case, exclusive f any evidence which they should think ought not to have een received. The defendants only to take such obections to the declaration as they might have taken at Nisi Prius, or in arrest of judgment; and the Court to be t liberty to make any amendment they might think the udge at Nisi Prius would have allowed.

Mr. *R. V. Richards*, for the plaintiffs.—By the provisions of this charterparty, 475*l.* freight was to be paid in ull for the voyage, unless the vessel could *enter* Oporto, *lischarge*, and *reload there*, in which case 300*l.* only were o be paid. The case finds that it was not possible for the naster to enter Oporto; he therefore proceeded to the tation assigned him outside the bar, and there commenced unloading. The charterparty allowed twenty-five laying lays. At the expiration of the twenty-five days, the larger freight became payable: the contingency of the master being afterwards enabled to enter the harbour was erfectly immaterial; the freight having already attached. The subsequent detention of the vessel off the castle of he Foz, and the non-delivery of a small portion of the argo, were occasioned by the voluntary act of the defendants' agent Dourado, who thought fit, on account of the ow price of provisions, and the crowded state of the warehouses, to keep the ship. The charterparty therefore was atisfied by the delivery off the castle of the Foz.—Then, he defendants having accepted and paid the bill drawn by Dourado as for the balance of freight, are precluded from

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now disputing the amount. Where money has been paid under a mistake as to the fact of his liability, a party may recover it back; but he must at all events shew, that, since the making of the payment, circumstances, of which he had at the time no knowledge or means of knowledge, have been communicated to him. Here there is no pretence for supposing that there existed any misapprehension or mistake. Dourado, the drawer of the bill, was the agent of the defendants, and was acting within the scope of his authority as such agent: and his acts have been adopted by the defendants.

Mr. *Wightman*, for the defendants.—The larger freight was only payable in an event that has not happened, viz. on the vessel's being unable to enter Oporto, discharge her cargo, and reload there; that is, in the event of her being compelled to discharge the *whole* of her cargo outside the harbour, and thereby losing the benefit of a home cargo, which alone was the consideration for the reduced freight. If the larger freight be held to have attached by reason of the partial unloading outside the bar, this absurd consequence might result from such a construction—the

' stress of weather, but the *laying days* only. The
: was to be executed in a foreign country, and
e must be construed with reference to the foreign
: and it appears that on two Sundays, viz. the 9th
h June, the unloading proceeded; there is there-
reason why those two days should not be reck-
The plaintiffs in their declaration stated that the
ıuld not enter Oporto, discharge, and re-load there,
ıg to the true intent and meaning of the charter-
whereas the case finds that she did enter Oporto,
n part, and re-load there: consequently the plain-
st be nonsuited; they were only, upon their own
:tion of the charterparty, entitled to receive the
:eight in the event of the vessel being unable to
;e any part of her cargo in the harbour of Oporto.

Richards, in reply.—The larger freight was primâ
yable. It was necessary that three things should
: before the attaching of the lesser freight—the
:ing able to enter the harbour of Oporto (within
nty-five laying days, at all events), to discharge
vard cargo there, and to re-load a home cargo.
:mitted by the case that the first was impossible,
: the second substantially did not take place. The
ı were therefore entitled to the full freight of 475*l.*

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late act (*a*), which operates a most valuable improvement in the administration of the law. The question arises upon the construction of a charterparty, an instrument upon which we are bound to put the same construction as mercantile men would put upon it, and to give effect to the intention of the parties so far as such intention is capable of being collected from the language they have adopted. It appears to me, upon the true construction of this charterparty, and under the circumstances stated in the special case, that the plaintiffs are entitled to the larger freight mentioned in the charterparty. It begins by stating that the vessel shall proceed to Oporto on receiving on board the stipulated cargo—" and, should the master think it possible to enter the port without risk from the batteries (meaning the batteries erected on the banks of the Douro, by the forces of Don Miguel, by whom the town was then invested), he agrees to discharge the cargo there; but, if not, he binds himself to proceed off the castle of the Fox, or to some other point near the bar, where the vessel can lie in safety, and there discharge into boats which the freighters bind themselves to send alongside." If we were to go no further, it would manifestly appear to have been the intention of the parties that whether the vessel should

Oporto, the Miguelites were in possession of batteries on each side of the entrance of the river Douro, and it was not then possible for her to enter the port without great risk and danger. I should therefore say, that, as the master was justified in abstaining from entering the harbour, the discharge must, for the purpose of ascertaining the freight, be considered as having taken place outside. The charterparty then proceeds thus:—"The vessel to be paid freight in full for the voyage the sum of 475*l.*, or, if the vessel can *enter Oporto, discharge, and re-load there*, then, in lieu thereof, the sum of 300*l.* only." Now, the larger freight being payable on the arrival of the vessel and her inability to enter the harbour, let us see when the lesser freight was to attach. That is made to depend upon three things, viz. the possibility of the vessel entering into the harbour of Oporto, discharging her cargo there, and re-loading a home cargo; and, as the vessel could not on her arrival enter the harbour and there discharge, two at least of the events contemplated by the parties as operating in reduction of the amount payable for freight did not arise. The charterparty then goes on to provide that "Twenty-five working days are to be allowed the said merchants (if the ship is not sooner dispatched) for unloading the cargo. Lay days to commence when the ship is off the castle of the Foz, or other point where she is to discharge, continue whilst there, cease if blown off the coast by stress of weather, and re-commence when again at anchor at her station: 4*l.* per day demurrage for every day over and above the said laying days." The charterparty does not contemplate or in any way provide for the case of the discharge of the cargo commencing at one place and concluding at another: it evidently contemplates that, the discharge once commencing, the whole cargo should be unloaded at the same spot. I merely use these observations as tending to shew that the fair inference to be drawn from the whole of the stipulations

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contained in the instrument is, that, unless at the moment of the ship's arrival off the bar of Oporto she could safely enter the harbour, and should there unload the whole of her cargo, the larger freight was to attach.

This construction, it is said, might give rise to a difficult and somewhat absurd consequence, for that it might have happened that a very minute portion of the cargo was delivered outside the harbour, and all the rest within. The case finds that seven eighths of the cargo were discharged into boats whilst the vessel was at anchor off the castle of the Foz. But it is contended that the freight did not become payable until the delivery of the remaining eighth of the cargo. Independently, however, of the observations arising upon the charterparty itself, it seems to me, that, inasmuch as the defendants' agent Dourado had thought proper to pay the larger freight before the vessel was discharged, he must be taken to have consented that the delivery of the cargo should be considered as having been virtually completed where she first took her station. And, when we consider the correspondence that took place between Dourado and the master, it is evident that the detention of the vessel on demurrage beyond the laying days arose from the voluntary act of the former. It would be

Mr. Justice GASELEE.—I am of the same opinion. The words of the charterparty would not be satisfied by the vessel's entering the harbour of Oporto, unloading, and re-loading there, at a period subsequent to the expiration of the laying days. And it appears that the defendants' agent, for his own convenience, thought fit to postpone the delivery. I therefore think the plaintiffs are entitled to recover to the full extent claimed.

Mr. Justice VAUGHAN.—I entertain no doubt as to the plaintiffs' right to recover. All commercial instruments are to be liberally construed, according to the intendment of the parties and the usage of the trade or of the country where the contract is to be executed. In the present case the clear intendment of the parties seems to me to have been, that, if the vessel could discharge her cargo in the harbour of Oporto, then the lesser freight should attach; but that, if she were prevented from entering the harbour, the cargo was to be discharged off the bar, and then that the larger freight should become payable. It has been contended that the consideration for the lesser freight was, the prospect of the ship's obtaining a home cargo at Oporto. But I should rather think the larger freight was intended as a compensation, not for the possible loss of a home cargo, but for the danger the vessel would encounter from remaining at sea. She did not substantially discharge her cargo in the harbour. No doubt all the acts and declarations of Dourado are to be taken as the acts and declarations of the defendants themselves: and I think, that, as regards the question of freight, they are precluded by the payment of the bill given by Dourado; and, as to the demurrage, that, the vessel having been detained, for the convenience of Dourado, sixty-two days beyond the laying days, the plaintiffs are entitled to recover in respect of that also.

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Mr. Justice BOSANQUET.—I am also of opinion that the plaintiffs were entitled to receive the larger freight of 475*l.*, and also the sum they claim for demurrage. The court are bound to put a rational construction upon the charterparty. Two cases are therein contemplated—the one, that the vessel should enter the harbour of Oporto, and there discharge her cargo, and re-load—the other, that, in the event of the master finding it impracticable to get into Oporto, the discharge should take place off the castle of the Foz. In the former event, the lesser, in the latter, the larger freight was to become payable. The master was bound to enter Oporto if possible: but the case finds that it was not so; and therefore the vessel came to anchor outside the harbour, at the place pointed out by the charterparty, and there unloaded the greater part of her cargo. Had it been practicable to enter the harbour and there discharge any part of the cargo within the twenty-five laying days, possibly the minor freight might have attached. But it is unnecessary to consider that; for, at all events, at the expiration of those days, the larger freight was due, it being then impossible to approach Oporto. One part at least of the consideration for the larger freight

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WATSON and Another, Assignees of DEVY, a Bankrupt, *v.* PEACHE.

Saturday, Nov. 22nd.

One D., a coal-merchant, had in his possession at the time of his bankruptcy several barges, two of which had formerly been his own property, but had been sold by him to the defendant, from whom he then hired the whole of them from year to year. The name and number of D. were painted on them, and D. was registered as the owner in the books of the waterman's company. In order to rebut the inference arising from these facts that the barges were property in the possession, order, and disposition of the bankrupt, so as to pass to his assignees under the 6 Geo. 4, c. 16, s. 72, evidence was given of the existence of a custom in the coal trade, well known and established for at least twelve years, for merchants to hire barges, and to use them with their own names painted thereon, where the hiring was for a permanency. It was left to the jury to say whether the evidence established a custom of so general a nature and so notorious as that it might fairly be presumed to be known *to all persons engaged in the coal trade*, or residing in the neighbourhood where the bankrupt carried on his business, or to those persons who dealt or were likely to deal with him. The jury having found a verdict for the defendant, affirming the custom, the court refused to set it aside, holding the direction to be correct, and the verdict warranted by the evidence.

THIS was an action of trover brought by the plaintiffs, assignees of the estate and effects of one Frederick Devy, a bankrupt, to recover the value of eleven barges, which the plaintiffs alleged were in the possession, order, and disposition of the bankrupt as reputed owner thereof at the time of his bankruptcy.

The cause was tried before Lord Chief Justice Tindal, at the Sittings in London after the last Trinity Term.

By the 7 & 8 Geo. 4, c. 75, an act for the better regulation of the watermen and lightermen on the river Thames, it is enacted (s. 39), that the clerk of the waterman's company shall, at the request of every person keeping any lighter, barge, or other boat or craft used for the carrying of goods &c., cause the name and place of abode of such person, and also the name of the lighter, barge, &c., to be duly registered in a book or books to be kept by the clerk of the said company for that purpose; and that the company shall also cause a number for such lighter, barge, &c., to be delivered by such clerk to the owner, who shall cause the same, together with the name of the said lighter, barge, &c., to be painted thereon. Penalty for working a barge, &c., without its being registered or the name and number being painted thereon—40*s.* By s. 56, the company are impowered to make bye-laws. By a bye-law made in April, 1828, *the owner* of every barge is required, under a penalty of 5*l.*, to have his name painted

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thereon—No. 1. If any freeman of the company navigate any barge not having thereon his own name or that of his master, he shall forfeit 40*s*.—No. 10. If any freeman of the company who hires a barge of any person not free of the company, and has his own name thereon, permits such person to participate in the profit, or shall permit any owner not being free of the company to have his name thereon, such freeman shall forfeit 40*s*.—No. 20.

The barges in question (two of which had formerly been the property of the bankrupt, but had been in the month of May, 1829, assigned by him to the defendant by way of set-off for an antecedent debt due from the bankrupt to the defendant) were let in the year 1829 by the defendant to the bankrupt on permanent hire; a three months' notice being to be given by either party in order to put an end to the hiring. The defendant was not a freeman of the waterman's company, and consequently could not obtain a number or have barges registered by the company in his own name, in pursuance of the 7 & 8 Geo. 4, c. 75. The barges were therefore (with the exception of two, which were not registered at all) registered in the name of Devy, and nine of them had his name and number painted there-

registered in the name of Griffith, and had his name and number painted on them. The major part of the creditors of the bankrupt were bankers, merchants, bill-brokers, and others, holders of his acceptances. The plaintiffs also called several witnesses to prove that they never heard of coal-merchants being in the habit of hiring barges and using them with their own names painted thereon; but that, in such cases, the name of the owner alone appeared.

On the part of the defendant, it was submitted, on the authority of *Storer* v. *Hunter* (*a*), that the possession of the barges by the bankrupt at the time of his bankruptcy was only primâ facie evidence of ownership in him, and capable of being rebutted by proof of circumstances tending to shew such possession not to be inconsistent with ownership in another: and several witnesses were called, who deposed to the existence of a custom that had prevailed in the coal trade for the last twelve or fourteen years, for merchants to hire barges, their names (and numbers, if freemen of the waterman's company) being painted thereon where the hiring was for a permanency, as, for a year or upwards. Of these witnesses, one was a coal-factor, and all the rest coal-merchants, barge-builders, or lightermen.

His Lordship told the jury that the evidence presented on the part of the plaintiffs established a primâ facie case of reputed ownership in the bankrupt: and he left it to them to say whether, taking the whole evidence together, it sufficiently proved the existence of a custom prevailing in the coal trade, for merchants to hire barges, and to use them with their own names painted thereon, of so general a nature and so notorious as that it might fairly be presumed to be known to all persons engaged in that trade, or residing in the neighbourhood where the

(*a*) 3 Barn. & Cress. 368, 5 Dow. & Ryl. 240.

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bankrupt carried on his business, or to those persons who had or were likely to have dealings with him; so as to be reasonably calculated to put parties upon their guard, and, by provoking inquiry, prevent their being misled by the fact of the barges being in the merchant's possession, and the merchant being thus enabled to obtain a fictitious credit: telling them, that, if they were satisfied that such a custom was sufficiently shewn to exist, the defendant was entitled to a verdict.

The jury, affirming the custom, returned a verdict for the defendant.

Mr. Serjeant *Wilde*, on a former day, obtained a rule nisi that this verdict might be set aside, and a new trial had, on the grounds—first, that the jury ought to have been directed that the custom attempted to be set up to defeat the claim of the bankrupt's assignees, ought to have been shewn to be a generally prevailing custom, and not merely an usage confined to the particular trade; for that, inasmuch as the greater part of the bankrupt's creditors were persons not concerned in the coal trade, and therefore not likely to be conversant with a custom of so limited a nature, all the mischief which the statute was intended to

reputed ownership, within the meaning of the 72nd section of the statute 6 Geo. 4, c. 16, the affirmative of the issue was for them to make out. If sufficient doubt be infused into the case to put parties upon inquiry, the reputation of ownership fails. To except the case from the operation of the statute, it was not necessary to shew a perfect and unvarying usage, or an usage extending beyond the particular trade, or the neighbourhood where the party carried it on. The case of *Stover* v. *Hunter* is precisely in point. There, a colliery, with all the machinery and implements necessary for working it, were leased for years, with a proviso for re-entry by the landlord on non-payment of rent, and a covenant on the part of the lessee, at the expiration or other sooner determination of the demise, to deliver up the machinery and implements, conformably to an inventory annexed to the lease, of which a re-valuation was to be made three months before the expiration of the demise; and the landlord recovered judgment in ejectment in Trinity Term, for a forfeiture in not paying rent, but did not execute the writ of possession until the 8th November; and the tenant committed an act of bankruptcy next day—it was held that the possession of the machinery and implements by the tenant was only qualified, and did not come within the meaning of the 21 Jac. 1, c. 19, s. 11, so as to bar the landlord's right of entry on the 8th November. "It appears by the evidence," said Lord Chief Justice Abbott, "that, in some instances, the articles used in collieries belong to the tenants, in others they do not; that, though in some cases the landlord, in demising collieries, permits the lessee on certain conditions to have the use of the fixtures and other things during the demise, yet, in other instances, they belong absolutely to the lessee. Then, if the possession of such things is consistent with the fact of a person being absolute owner, and also of his not being absolute owner, the mere possession of such things ought not to raise an inference in the mind

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of any cautious person acquainted with the usage, that the person in possession is the owner. If it had not been the usage for the owners of collieries ever to demise the machinery and other things used in the colliery, then possession by the lessee would be evidence of reputed ownership; and, no evidence having been adduced to shew that the bankrupt ever had the absolute ownership in the articles used in these collieries, I am of opinion that the jury ought, upon these facts, to have given a verdict for the defendant." In *Horn* v. *Baker* (*f*), A., B., and C., partners and distillers, occupied certain premises leased to A. and another, and used in common in the trade the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in A. On the dissolution of the partnership, it was agreed that C. and one J. should carry on the business on the premises; and by deed between C. and J. and A. it was covenanted and agreed that A. should withdraw from the business, and permit C. and J. to use, occupy, and enjoy the distil-house and premises, paying the reserved rent, &c., and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an an-

fixed to the freehold, did not pass to the assignees under the words "goods and chattels" in the statute; but that the vats, &c., which were not so fixed, did pass to the assignees, as being left by the true owner in the possession, order, and disposition (as it appeared to the eye of the world) of the bankrupts as reputed owners. Lord Ellenborough there said: "If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in the trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have carried the reputed ownership." *Muller* v. *Moss* (*g*) and *Clark* v. *Crownshaw* (*h*) are to the same effect. In the present case, the custom established by the evidence was sufficiently general to put all those who dealt or were likely to deal with the bankrupt upon inquiry as to whether or not he was the real owner of the barges. The legislative enactment requiring the name and number of the owner to be painted on the craft, is a mere police regulation, for the purpose of ascertaining the party answerable for any damage that may be done by it to any other vessel in the river. And it appears on the evidence that the defendant was not a freeman of the waterman's company, and therefore could not have his own name on his barges. The cases of *Thackthwaite* v. *Cock*, and *Knowles* v. *Horsfall*, cited on the part of the plaintiffs, have no bearing upon the present: in the latter no usage of trade was relied on; and in the former, though there appeared to have been a custom, yet, it being one calculated and intended to deceive and defraud the public, the court therefore held it not to be valid.

(*g*) 1 Mau. & Selw. 335. (*h*) 3 Barn. & Adol. 804.

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Mr. Serjeant *Talfourd* and Mr. *Swann*, in support of the rule.—Undoubtedly a mere case of reputed ownership by possession is in its nature equivocal, and is answered by shewing that a custom existed like that attempted to be set up on this occasion, and that those who knew of the possession were also cognisant of the custom. But the question here is, whether there can be such an usage within a particular trade, as will bind all the rest of the world. In *Hickenbotham* v. *Groves* (*i*), it was held, that, if A. let a house to B., with a covenant that the lease shall determine on B.'s committing an act of bankruptcy on which a commission of bankrupt should issue, and by another deed of the same date A. grants the use of the furniture to B. in like manner, and with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy, and B. become bankrupt, the jury will be warranted in finding, notwithstanding these covenants, that B. was the reputed owner of the furniture. In *Thackthwaite* v. *Cock* it was held that a custom that purchasers of hops from hop merchants shall leave them in the merchant's warehouse for the purpose of re-sale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming

wine merchant, several casks of brandy, some of which were at the time of the sale in Dixon's own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. The sale was notorious to the persons carrying on the wine trade at the place where the parties resided; but no notice of such sale had been given to the warehouse-keeper with whom some of the casks were deposited. A. having become bankrupt while the brandies remained where they were originally deposited—it was held that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the statute. "The letter K. marked on the casks might," said Lord Chief Justice Abbott, "speak a language to a certain class of persons intelligible, but to others, who might be induced to become the creditors of Dixon in the belief that the brandies belonged to him, it would be wholly unintelligible. If any person of the latter description had purchased them of the bankrupt, I have no doubt that he would have had a good title to them as against the plaintiff. For, the real owner ought not to have left the goods after the purchase in the hands of Dixon, and suffered him to treat them as his own." And Mr. Justice Bayley said: "It was necessary that something should be done to make the change of property notorious to the public at large, or at least to those persons who were likely to trust the bankrupt upon the faith of his having the property in these goods. It is not sufficient that it should be known only to persons in the same trade." And Mr. Justice Best—"It is not sufficient that the sale was known to persons in the wine trade at Liverpool. The transfer of the property ought to have been known to all other persons who might, in consequence of the bankrupt's

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continued possession of it, have been induced to give him credit." Here, from the circumstance of the barges being registered in the name of the bankrupt, and bearing his name and number, they were notoriously held out to the world as being his property. [Lord Chief Justice *Tindal*.—Very little can be inferred from that, provided the custom be established, as the jury have found: the fact of a party's arms being painted on a carriage is not conclusive evidence of reputation of ownership, it being well known to be the constant practice to job carriages.] With regard to two at least of the barges there can be no doubt: they were admitted to have formerly been the property of the bankrupt, and secretly transferred by him to the defendant. Upon that point *Lingard* v. *Messiter* (*k*) is a direct authority. There, a judgment creditor purchased by a bill of sale from the sheriff certain machinery seized in execution belonging to his debtor, and, after marking the same with his initials, allowed the debtor to retain possession upon his agreeing to pay a rent for the use of it, and the latter remained in possession until he committed an act of bankruptcy: it was held, that, as the change of ownership was not notorious, the assignees were entitled to recover the property in trover, under the 21 Jac. 1, c. 19, s. 11, as

commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission." The words of this clause to which reference has in all the cases been more particularly made, are these—"whereof he was reputed owner;" and the question here is whether the reputed ownership of the barges was upon the evidence sufficiently established to have been in the bankrupt at the time of his bankruptcy. Two objections have been urged to impeach the verdict that has been found by the jury—first, that in point of law they were misdirected—secondly, that their finding was contrary to the evidence.

With respect to the second ground of objection, it is enough to say that there was evidence on both sides. Primâ facie the ownership of the barges appeared to be in the bankrupt. But there was evidence on the other side to a considerable extent to shew an usage well known and established in the trade of which the bankrupt was a member, and notorious in the neighbourhood in which he carried on his business, that barges were hired by coal-merchants, and that the names of the merchants usually appeared upon the barges so hired by them, where the hiring was for a permanency. It is true there was also to some extent evidence of a contrary character. But the whole was a question for the jury, and was left for their consideration: and I take it the province of the jury would be at an end if the courts were to interfere to set aside verdicts founded on fact, unless in cases where a manifestly erroneous and improper conclusion had been come to. In the present case I do not see that the verdict is so manifestly wrong as to satisfy me that we should be justified in sending the cause down for a further inquiry.

The next point to be considered is, whether or not the proper question was left to the jury. It was in substance left to them to say whether they thought the evidence established any general course of dealing in the coal trade

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for merchants to hire barges and to use them with their own names painted thereon: and they were told, that, to render such a custom valid in law, it must be one so general as to be notorious to all persons carrying on that particular trade; and to all persons having dealings, or being likely to have dealings with the bankrupt. It has been urged on the part of the plaintiffs that this direction was too limited: and it is said, that, in order to render the usage available, it must be one that is not only notorious in a particular trade or neighbourhood, but notorious to all the world, or at all events to all those classes of persons who might in any way become creditors of the persons carrying on such trade—indeed, that the question should have been left to the jury in the very words of the act. Now, it appears to me that the question was virtually and substantially so put to the jury, though in a more expanded form; and that such was the proper mode of leaving it; for, if it were to be left to them in the bare words of the statute, it would be leaving them to deal with a question they could not properly understand. It is then said, that, at all events, the question should not have been left in so restricted a form. But, reputed ownership can

for the purpose of resale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition. There, the hops were exposed to the view of the persons coming into the merchant's warehouse to purchase, promiscuously with the other goods in the warehouse. It is clear therefore, that, as far as the eye of the public could penetrate, there was no distinction between these goods and the goods of the bankrupt; and thus the leaving them in that situation was calculated to give the bankrupt a false and delusive credit with the world: and consequently it was properly held that the custom was not one that could be supported in law, so as to prevent the hops from becoming the property of the assignees, as being in the possession, order, and disposition of the bankrupt, within the statute 21 Jac. 1, c. 19, s. 11. That seems to me to be a very different case from the present. It differs materially from the case of a custom for the hire of implements used for the purpose of carrying on a trade. With respect to the case of *Knowles* v. *Horsfall*, no general custom was there set up; and the only question was, whether the bankrupt was to be considered reputed owner under the particular circumstances of the case. There, one Dixon, a spirit-merchant, sold to the plaintiff, a wine-merchant, several casks of brandy, some of which were at the time of the sale in Dixon's own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. The sale was notorious to the persons carrying on the wine trade at the place where the parties resided; but no notice of such sale had been given to the warehouse-keeper with whom some of the casks were deposited.

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It was contended, that, as it was notorious to the trade that the plaintiff had purchased the brandies in question, there could be no reputed ownership in Dixon. But, Dixon having become bankrupt while the brandies remained where they were originally deposited, the court held that the whole of them passed to his assignees, as being goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 Jac. 1, c. 19, s. 11. It seems to me to be impossible to say that the court did wrong in holding under the circumstances that the property in the brandies remained in the bankrupt notwithstanding the sale.

In the present case I see no reason for adopting a different mode of stating the question to the jury from that which other judges have thought it right to do on other occasions. I am therefore of opinion that the rule ought to be discharged.

Mr. Justice GASELEE.—I am of the same opinion. In *Knowles* v. *Horsfall*, even the warehouse-keeper in whose possession a part of the brandies was, did not know of the fact of the transfer: therefore it could scarcely be said to

barges in question. They certainly did establish a primâ facie case of reputed ownership in the bankrupt. But whether owner or not was a question of fact: and the contention was whether or not there appeared upon the defendant's evidence an usage as to the hiring of barges so notorious in the particular trade and neighbourhood as to destroy the primâ facie case on the part of the assignees. The jury have, and I think properly, found that such an usage was established. In *Storer* v. *Hunter* there was evidence on both sides; and the court held, that, where the circumstances of the possession were such as to shew it to be consistent with the true ownership being in the bankrupt or not, a case of reputed ownership within the meaning of the statute was not made out. It appears to me that we should be disturbing a settled principle of law, if we were to depart from the rule laid down in that case. I am quite as jealous of interfering with the province of the jury in matters of mere fact, as I should be of any interference on the part of the jury on a point of law that is peculiarly for the judge's determination.

Mr. Justice BOSANQUET.—I am not in this case disposed to think that the jury have come to an erroneous conclusion. The evidence laid before them distinctly established the existence of the usage in question, and its notoriety in the trade of which the bankrupt was a member, and in the neighbourhood in which he carried on such trade. The question is whether the mere putting the name of the bankrupt upon the barges hired by him gave rise to a reputed ownership in him, as contradistinguished from the real ownership. In determining this question it is material to consider what was the nature of the articles in respect of which this reputed ownership is supposed to exist. They are not articles of merchandize, but machinery or implements used by the bankrupt in the exercise of his trade. The evidence offered on the part of the defendant

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established to the satisfaction of the jury that there was a custom in the coal trade for merchants to hire barges of other persons, the merchant putting his name on them where they were hired permanently, as, for a year. The putting on the barges the name of the owner seems to be a mere police regulation required by the waterman's act, 7 & 8 Geo. 4, c. 75, s. 39, in order to afford a ready means of obtaining redress in case of damage being done to other craft. The custom in question was clearly and satisfactorily shewn to have been existing and well known in the bankrupt's trade. But it has been contended on the part of the plaintiffs, that, although the custom may be well known in the coal trade, yet the majority of the bankrupt's creditors do not belong to that trade, and consequently were ignorant of the existence of any such custom. If, however, it were generally known amongst those concerned in the trade that such an usage prevailed, no reputed ownership could arise within the sphere of that trade, and therefore those who dealt or were likely to deal with the bankrupt in the way of his trade could not be misled. If, in consequence of the existence and notoriety of the usage, no reputed ownership in barges so hired could be acquired

es, no usage of trade was set up. But the case of *ckthwaite* v. *Cock* is urged as being more applicable he present occasion, because there a custom of trade relied on. It appeared in that case that the plain-, in November, 1808, purchased seventy-eight pockets hops, the goods in question, of one Moore, a hop-mer-ant, and paid for them, and agreed with him that the ps should remain in Moore's warehouses at a certain nt until the plaintiff should think it advantageous to re-ell them. In 1810 Moore became a bankrupt, and his assignees, finding these hops on the premises, and con-ceiving them to be goods in the order and disposition of the bankrupt, within the statute 21 Jac. 1, c. 19, s. 11, refused to deliver them to the plaintiff. The plaintiff endeavoured to take the case out of the statute by proving a custom of the trade for purchasers of hops to permit them to remain upon rent in the hop-merchants' warehouses. The hops in question were exposed to the view of persons coming into the warehouse to purchase, promiscuously with the other goods of the bankrupt; and they were undistinguished by any conspicuous mark from Moore's goods, because anything that would draw attention to the length of time they had been on sale, would hurt the sale of them. It was held that this was not such a custom as would prevent the hops from becoming the property of Moore's assignees, on his becoming bankrupt, as being in his possession, order, and disposition. It would have been in direct contravention of the statute to have determined otherwise: one of the objects of the parties was to deceive and mislead the public.

Two of the barges in question having formerly been the property of the bankrupt, and the transfer of them to the defendant never having been made public, it is contended, on the authority of *Lingard* v. *Messiter*, there was no evidence to go to the jury that the bankrupt had ever in fact ceased to be the owner. That, however, raises a primâ

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facie case of ownership only; which, like every other primâ facie case, is capable of being rebutted. It seems to me to leave the case precisely where it was, only that it calls for a stronger answer: and that I think has been afforded.

Rule discharged.

Friday, Nov. 7th.

To found a motion for judgment against the casual ejector, a declaration intituled thus, "In the Common Pleas, June 12th, 1834," will suffice, notwithstanding the 15th rule of Michaelmas Term, 3 Will. 4, does not apply to actions of ejectment.

DOE *d.* ASHMAN *v.* ROE.

MR. *Whatley* moved for judgment against the casual ejector. The declaration was intituled "In the Common Pleas, June 12th, 1834." The notice to the tenant was dated the 15th October, was served on the 17th, and directed him to appear "within the first four days of next Michaelmas Term."

The Secondary objected that the declaration should have been intituled of the preceding term, or, if of a particular day, then, *as of the preceding term*—the 15th rule of Michaelmas Term, 3 Will. 4 (*a*), not applying to actions of ejectment.

[redacted]

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Tuesday, Nov. 18th.

The defendant was committed to Newgate by a subdivision court of the court of bankruptcy in London, for refusing to answer certain questions put to him:—The court, at the instance of the bail (who had justified after final judgment was signed in the action, and after the bankrupt's last examination had been several times adjourned), granted time to render the defendant till the fifth day of the next term.

WAUGH *v.* ASHFORD.

THIS was an action by the indorsee against the acceptor of a bill of exchange. The action was commenced in September, 1833; and, on the 10th December, a fiat in bankruptcy issued against the defendant, whose last examination was appointed to be had on the 4th February, 1834. Final judgment was signed against the defendant on the 13th of March, and a sci. fa. afterwards issued against the bail, returnable on the 12th June. On the 14th March the defendant was discharged out of custody, on his procuring bail to justify for him. The defendant's last examination under the fiat was several times adjourned both before and since the 14th of March; and, on the 12th May, the defendant was committed by a subdivision court of the court of bankruptcy to the custody of the governor of Newgate, for refusing to answer certain questions put to him, and the final examination was adjourned sine die. The fact of the bankrupt's last examination having been repeatedly adjourned was known to the bail at the time of their justification. The fiat was worked in London.

Mr. *Price*, on behalf of the bail, in Michaelmas Term last, obtained a rule calling upon the plaintiff to shew cause why the time for rendering the defendant should not be enlarged until after he should have passed his last examination under the fiat.

Mr. Serjeant *Wilde* and Mr. *Channell* shewed cause.—It is only under peculiar circumstances that the courts will grant time for bail to render their principal—where the render has been prevented by some act of the law. Thus, where the principal has become bankrupt, the courts have enlarged the time for rendering him, in order

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to prevent expense to his estate, and inconvenience to the bankrupt in making out his accounts and passing his examination—*Maude* v. *Jowett* (*a*), *Offley* v. *Dickens* (*b*), *Crump* v. *Taylor* (*c*), *Stead* v. *Yates* (*d*), *Tinson* v. *White* (*e*). So, where the principal had been required to appear before commissioners in a distant county—*Glendining* v. *Robinson* (*f*). But time has never been granted where the commission was a London one, and the parties resident there. In *Shaw* v. *Cash* (*g*) this court expressly refused to enlarge the time to render, because the affidavit omitted to state where the commission was sued out, or where the commissioners resided. And in *Harris* v. *Alcock* (*h*), the court of Exchequer, on a similar application, required an affidavit that it would be inconvenient for the commissioners to attend at the county jail, or in London, to take the bankrupt's final examination. In *Wynn* v. *Petty* (*i*), the court of King's Bench refused to enlarge the time for bail to render their principal, on an affidavit that he could not be removed without endangering his life. So, where it was sworn that he was a lunatic; it not appearing that he was in such a state as to occasion any immediate peril of life, either to himself or those about

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render their principal in due time arises from some act of the law, the courts have been in the habit of allowing time; as in *Folkein* v. *Critico* (*l*), where the defendant was in the custody of a king's messenger under an order of the secretary of state, for the purpose of being sent out of the kingdom by virtue of the alien act, 43 Geo. 3, c. 155; in *Hodgson* v. *Temple* (*m*), where the party was in the custody of the sheriff upon an extent at the suit of the crown; in *Ashmore* v. *Fletcher* (*n*), where the principal was suffering imprisonment in a county jail, under a conviction and sentence for a misdemeanor; and in *Joyce* v. *Pratt* (*o*), where he was in criminal custody, awaiting the decision of the twelve judges on a point of law arising out of his defence on the criminal charge. So, where the principal was convicted of setting fire to his house, and sentenced to be imprisoned, the court gave the bail time to render him till after the expiration of his imprisonment on the criminal charge—*Rex* v. *Fearne* (*p*): again, where the principal was under imprisonment in a county jail upon a conviction for libel—*Campbell* v. *Ackland* (*q*). But, in *Grant* v. *Fagan* (*r*), the court refused to enlarge the time on the ground of the unwarrantable arrest and detention of the principal by a foreign enemy. The facts of the present case shew the bail to be in such a situation as wholly to exclude them from the favourable consideration of the court. Their recognizance was not

280, where, the return to a latitat stating that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, the court of King's Bench refused to grant an attachment against the sheriff.

(*l*) 13 East, 457. And see Merrick v. Vaucher, 6 Term Rep. 50.

(*m*) 1 Marsh. 166, 5 Taunt. 503.

(*n*) M'Clel. 252, 13 Price, 523. And see Rouch v. Boucher, 10 Price, 104.

(*o*) 4 Moore & Payne, 55, 6 Bing. 377.

(*p*) 1 Marsh. 170, n.

(*q*) 1 Cr. & Meeson, 73, 1 Dowl. P. C. 635.

(*r*) 4 East, 189, 1 Smith, 12.

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entered into until after the plaintiff had obtained judgment; and the application to the court was delayed until the bail were fixed. Besides, the rule asks that the time may be enlarged until the expiration of the imprisonment of the principal; this is much too indefinite, inasmuch as the period of his imprisonment entirely depends upon himself—he standing committed until he shall answer the questions put to him by the commissioner.

Mr. Serjeant *Bompas* and Mr. *Price*, in support of the rule.—If this cause had been in the King's Bench instead of in this court, no difficulty could have arisen, for then the bail might have brought up their principal by habeas corpus for the purpose of his being re-committed charged in this action; and thus obtained more effectual relief than from the constitution of this court can be obtained here. *Taylor's* case (*s*) in the King's Bench is precisely similar to the present: it was there held that one who was committed to Newgate by commissioners of bankrupt for not answering satisfactorily to certain questions, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by ha-

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it out of their power to perform the alternative of their obligation, without any default, laches, or possible collusion on their part (*w*). The practical modes of relief which the courts have adopted for that purpose are these three: first, in cases of total impossibility, it is effected by ordering an exoneretur to be entered upon the bail-piece, on motion for that purpose; or, in the case of bail below, that the bail-bond be delivered up to be cancelled: that mode is consistent with the jurisdiction of all the courts. A second mode (which is necessarily confined to the court of King's Bench (*x*)) has been, in cases of temporary impracticability arising from the defendant being, at the time when he should be rendered, in legal *criminal* custody, by ordering him to be brought up by habeas corpus, in order that he may be formally rendered in discharge of his bail. A third mode is, by the court's enlarging the time for making the render: this also is within the power and may be resorted to by all the courts (*w*). And the short result of all the determinations seems to be, that, wherever the court cannot absolutely exonerate the bail, and, either from the constitution of the court itself, or the circumstances of the particular case, cannot enable them at once to make a formal render, they will, in all practicable cases of a temporary impossibility occasioned by act of law, and even perhaps in other cases under special circumstances, enlarge the time for making the render, in order to give the bail an opportunity of rendering their principal, as soon as it shall be in their power to do so (*y*). [Mr. Justice *Bosanquet* suggested that an application might be made to the commissioners to cause the defendant to be brought before them, and then to commit him to the Fleet Prison, whence he might be brought up and re-committed charged

(*w*) 13 Price, 525, n.

(*x*) See Currie v. Kinnear, 1 Brod. & Bing. 23; S. C. Bennett v. Kinnear, 3 J. B. Moore, 259. Sharp v. Sheriff, 7 Term Rep. 226. Daniel v. Thompson, 15 East, 78.

(*y*) 13 Price, 532-3, n.

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with this action]. The defendant already stands committed *until* he shall answer the questions proposed to him. The commissioners therefore have no power to cause him to be again brought before them for the mere purpose of changing his place of confinement.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the opinion of the court:—This is an application on the part of bail for an enlargement of the time for the render of their principal (who has become bankrupt) until he shall have passed his final examination: and it seems to be an application without any precedent. But, at the same time, there are circumstances in the case that induce us to grant the prayer of the motion to a limited extent. It is clear, that, if this had occurred in the court of King's Bench, the remedy would have been easy and complete—by a habeas corpus directed to the keeper of Newgate, for the purpose of the defendant's being brought up and re-committed charged in the action. But, as from the constitution of this court we have no such power, we are disposed as nearly as possible to deal out an equal measure of justice: and therefore we think that, on payment of the costs of

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WILKINSON, Executrix, of BEAVAN, Deceased, *v.* EDWARDS.

Tuesday, Nov. 18th.

Where an executor has commenced an action without using due diligence to ascertain that he can proceed with a reasonable prospect of success, or is guilty of any laches so as to cause unnecessary expense or vexation to the defendant, the court will not interpose to excuse him from costs, in exercise of the discretion given to them by the 31st section of the 3 & 4 Will. 4, c. 42.

THIS was an action on a promissory note for 20*l.*, by the executrix of the payee against the maker. On the death of the payee, in the month of June, 1831, the note in question was found amongst his effects. The maker and payee, and also a person by whom the maker's signature was attested, resided at the time of the making of the note in Monmouthshire; and at the time the action was commenced the defendant and the attesting witness were still resident there. The venue was laid in Middlesex. The plaintiff not duly proceeding to trial, the defendant obtained a rule for judgment as in case of a nonsuit, which was, in Hilary Term, 1834, discharged on the plaintiff's giving a peremptory undertaking to try at the next Sittings. Application was then made by the plaintiff's attorney to the defendant's attorney for information as to the nature of the defence, and for an admission of defendant's handwriting to the note. This application was unsuccessful, the defendant's attorney declining to make any admission. The plaintiff having failed to proceed to trial pursuant to the undertaking, a second rule for judgment as in case of a nonsuit was obtained, and also discharged on a peremptory undertaking. This second undertaking was likewise broken, and judgment was entered up accordingly.

Mr. Serjeant *Atcherley*, in Trinity Term last, obtained a rule nisi that the proceedings might be stayed without costs, under the 3 & 4 Will. 4, c. 42, s. 31—upon an affidavit stating (amongst other things) that the plaintiff when she commenced the action believed it would be undefended, and that the sole reason for neglecting to proceed to trial was, that she was unable to prove the defendant's handwriting.

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WILKINSON v. EDWARDS.

Mr. Serjeant *Wilde* now shewed cause.—He submitted that the course pursued by the plaintiff was, under the circumstances, so vexatious as to disentitle her to the relief which by the statute the court might in their discretion afford her.

Mr. Serjeant *Atcherley*, in support of his rule.—Before the passing of the 3 & 4 Will. 4, c. 42, an executor or administrator suing in his representative character upon a contract made with the testator or intestate, was not liable to costs upon a judgment as in case of a nonsuit, except to such costs as had been occasioned by his wilful default, *Woolley* v. *Sloper* (*a*). In the present case, the plaintiff, finding a recent note, purporting to be drawn by the defendant, in the possession of the testator at the time of his death, properly commenced an action upon it. This she was bound to do; a neglect to do so would have amounted to a devastavit. The action being defended, the plaintiff applied to the defendant's attorney in order to ascertain whether or not he had any defence. This information being withheld from her, and she being unable to obtain proof of the defendant's handwriting to the note, which the latter refused to admit, she was compelled to

contracts made with and wrongs done to the plaintiff. There being still many cases in which the defendant was not aided by that statute, its provisions were afterwards enlarged by the 4 Jac. 1, c. 3; still, however, reserving it to cases of contracts personal: and, this latter statute being framed upon the model of the 23 Hen. 8, c. 15, does not extend, any more than that, to actions brought by executors or administrators. This being the state of the law, it not being in consequence of any peculiar merits in executors and administrators that they were held to be exempted from costs in certain cases, and it being thought unreasonable that any general exemption should be suffered to exist in their favour, the statute 3 & 4 Will. 4, c. 42, s. 31, enacted, that, "in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts of law at Westminster, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." The general rule therefore now is, that an executor or administrator who is nonsuited or against whom a verdict passes, is liable to costs, unless he can satisfy the court that the peculiar circumstances of the case are such as ought to induce them, in the exercise of the discretion which the statute gives them, to make an exception in his favour. The question is whether the facts disclosed here present a case to call for the active interference of the court. Regard must be had to the conduct of the parties. It is said that it was the duty of the plaintiff in this case to institute the suit, and that a neglect to do so would amount to a devastavit. But I think it is in all cases the duty of

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the executor before bringing an action to make due inquiry as to whether or not he is in a situation to prosecute it to a successful result. In the present instance the plaintiff appears not to have used due diligence in this respect: she was not prepared with proof of the handwriting of the defendant to the note. She ought to have ascertained how that fact stood before the commencement of the action. The proceeding was too hastily taken. Besides this, it appears that the venue was laid in Middlesex, although the cause of action (if any) arose in Monmouthshire, and the only witness who could know anything of the transaction also resided in the latter county. It is further shewn by the affidavits that there have been two peremptory undertakings to try, and both disregarded. Such a course of proceeding was calculated greatly and unnecessarily to increase the burthen of costs to the defendant; and therefore I think that this is not a case in which the court can in the exercise of its discretion hold the plaintiff to be exempted from the general operation of the statute.

Mr. Justice GASELEE.—I am of the same opinion. The

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abuse in the law. Are the circumstances of this case such as to satisfy the court that the action ought to have been brought? I am of opinion that some inquiry should first have been made, and that the plaintiff was bound to ascertain whether she could procure evidence to support it. The proceeding seems to have been commenced hastily and prosecuted vexatiously.

Mr. Justice BOSANQUET.—The statute puts executors and administrators, in respect to costs, upon the same footing as other persons; reserving to the court or a judge power to exempt them from payment of costs where the particular circumstances of the case seem to them to warrant it. It is therefore incumbent upon the party seeking to excuse himself from costs to shew a sufficient ground for the exercise of the discretion thus given to the court. In the present case I think the plaintiff has not shewn us anything to entitle her to the relief she seeks; more especially as she has given two peremptory undertakings to try, and thus fruitlessly enhanced the costs.

Rule discharged (*b*).

(*b*) See Southgate v. Crowley, post, Hilary Term.

SIMMS and Another, Assignees of BARNARD, an Insolvent Debtor, *v.* SIMPSON.

Wednesday, Nov. 19th.

The assignment under the 11th section of the insolvent debtors' act, 7 Geo. 4, c. 57, vests the property of the insolvent in his assignees only from the time of its execution.

Therefore, where an insolvent went to prison on the 13th April, on the 14th sold to the defendant (his landlord) certain fixtures on the premises he had occupied, and on the 18th petitioned for his discharge under the act, at the same time executing the usual assignment of his effects to the provisional assignee:—Held, in *assumpsit* brought by the assignees to recover the price of the fixtures, that the defendant was entitled to set off a sum due to him from the insolvent for rent.

THIS was an action of assumpsit brought by the plaintiffs as assignees of one Barnard, an insolvent debtor, to

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recover the value of certain fixtures sold by Barnard to the defendant, and also a sum of 100*l.* that had been deposited with the latter by way of security for the rent of premises held under him by Barnard. One count of the declaration alleged the sale of the fixtures to have been made by the insolvent, and another by the assignees. The defendant pleaded a set-off for rent due to a larger amount than the sum claimed by the plaintiffs.

The cause was tried before Lord Chief Justice Tindal, at the Sittings at Westminster after the last term. The facts appearing in evidence were as follow:—In July, 1831, Barnard became tenant to the defendant of certain premises, under a lease, at the yearly rent of 323*l.* 5*s.*, depositing 100*l.* as a security for the rent pro tanto. Barnard wishing to quit the premises in the month of April following, it was agreed that the lease should be cancelled and that the defendant should take the fixtures at a valuation: and they were accordingly valued at 60*l.* 1*s.* 4*d.*, which sum, together with the 100*l.* deposit, the plaintiffs sought to recover in this action. A larger sum was proved to be due to the defendant for rent. The valuation and the sale of the fixtures took place on the 14th April,

[redacted]

day of the imprisonment of the insolvent. *Herbert* v. *Wilcox* (*a*) and *Sharpe* v. *Thomas* (*b*) were cited. A verdict was found for the defendant, his lordship reserving leave to the plaintiffs to move to set it aside and enter a verdict for them, if the court should be of opinion that they were under the circumstances entitled to recover.

Mr. Serjeant *Andrews*, accordingly, on a former day, obtained a rule nisi.

Mr. Serjeant *Wilde* and Mr. Serjeant *Atcherley* now shewed cause.—If there be any ground for supposing that the title of the plaintiffs as assignees accrued, by relation, at a time prior to the assignment, at all events the contract is affirmed by the form of action they have thought proper to adopt. In *Smith* v. *Hodson* (*c*) it was held, that, if a bankrupt on the eve of his bankruptcy fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover; but, if they bring assumpsit, they affirm the contract, and then the creditor may set off his debt. And in *Thorpe* v. *Thorpe* (*d*), where A. remitted a bill of exchange to B., to be paid to a third person on A.'s account, and B. discounted the bill, but did not pay over the proceeds, and A. thereupon sued him in assumpsit for money had and received—it was held that in this action a set-off was admissible. Mr. Justice J. Parke there said: "If the plaintiff had chosen, instead of assumpsit for money had and received, to bring a special action for the breach of duty, there could have been no set-off, because it would have been an action for unliquidated damages. But, by bringing assumpsit for money had and

(*a*) 3 Moore & Payne, 515, 6 Bing. 416.
(*b*) 4 Moore & Payne, 87, 6 Bing. 203.
(*c*) 4 Term Rep. 211.
(*d*) 3 Barn. & Adol. 580.

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received, he lets in the consequences of that form of action, one of which is the right of set-off."

The 30th and 31st sections of the 7 Geo. 4, c. 57, have no application to the present case. The 32nd section relates to fraudulent preferences by insolvents. The plaintiffs have themselves negatived any fraudulent preference in this case, by bringing assumpsit for the price of the goods. If a fraudulent preference, the plaintiffs cannot treat the transaction as a contract of sale either by the insolvent or by themselves. The title of the assignees dates from the assignment to the provisional assignee: the property of the insolvent is vested in them only from that time. The 11th section requires the party to execute the assignment at the very moment that he, by petitioning the court for his discharge under the act, evinces an intention to avail himself of the benefit of its provisions. The 32nd section and the various other clauses in the act addressed to the prevention of fraud, would be altogether nugatory if the property vested in the assignees by relation to any antecedent period. *Herbert* v. *Wilcox* merely decided that a *voluntary* payment by a debtor to his creditor, such debtor being in insolvent circumstances at the time, and with-

person being in embarrassed circumstances employed the defendant, an auctioneer, to sell his furniture: the defendant sold, and paid over the proceeds to the order of his employer, who shortly afterwards filed his petition and schedule in the insolvent debtors' court, and was discharged under the statute 7 Geo. 4, c. 57: it was held that the defendant was not liable to the assignee of the insolvent, as he could not be deemed a trustee for a creditor within the 32nd section of the act, and his employer having dominion over his property *till the filing of his petition.*

Mr. Serjeant *Andrews* and Mr. *Cresswell*, in support of the rule.—The objection to the form of the action is now urged for the first time. The defendant's possession of the goods in question arose out of a fraud upon the insolvent debtors' act, and therefore the plaintiffs may maintain assumpsit for the price without affirming the contract—*Hill* v. *Perrott* (*g*), *Abbotts* v. *Barry* (*h*); consequently the defendant had no right of set-off.

It must be conceded that the whole question here is whether or not the assignment vests the property of the insolvent in the assignees only from the time of its execution, or has relation back to the commencement of his imprisonment; and that the statute 7 Geo. 4, c. 57, contains no express words creating such relation. But neither does the bankrupt act, 6 Geo. 4, c. 16, contain any express words vesting the property of the bankrupt in his assignees by relation to the time of the act of bankruptcy. The language of the 63rd section of the 6 Geo. 4, c. 16, which directs the conveyance of the bankrupt's property to the assignees, is the same in substance as that of the 7 Geo. 4, c. 57, s. 11, directing the assignment by the insolvent to the provisional assignee; and yet, under the 63rd section, all the bankrupt's property is

(*g*) 3 Taunt. 274. (*h*) 5 J. B. Moore, 98, 2 Brod. & Bing. 369.

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held to be vested in his assignees from the moment of his committing an act of bankruptcy. The language employed in the 11th section of the 7 Geo. 4, c. 57, and in particular the adoption of the word "prisoner," necessarily implies that the legislature intended to deal with all the property the insolvent was possessed of at the time he first surrendered to prison. In the 63rd section of the bankrupt act, the word "bankrupt" is used in the same sense as the word "prisoner" in the insolvent act. An examination of the 16th section of the 7 Geo. 4, c. 57, leads irresistibly to the same conclusion. By the 30th section it is enacted, "that, if any person who shall petition the said court for his or her discharge from imprisonment under this act, shall, *at the time of his or her arrest, or other commencement of such imprisonment*, by the consent and permission of the true owner thereof, have in his or her possession, order, or disposition any goods or chattels whereof such prisoner was reputed owner, or whereof he or she had taken upon him or her the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such prisoner so petitioning, so as to become vested in the provisional assignee of the said court by the conveyance and assignment executed in pursuance of this

imprisonment according to this act, upon the goods or effects of any such person, shall be available for more than one year's rent accrued prior to the execution of the conveyance and assignment by such person in pursuance of this act." In like manner, wherever any clause in the insolvent act makes reference to any particular time, the commencement of the imprisonment is invariably the time mentioned. An act of bankruptcy by lying in prison two months, when complete, relates back to the arrest and first imprisonment, to vest the bankrupt's property in his assignees from that time—*King* v. *Leith* (*k*): and his assignees may maintain an action for money had and received against a person who, having notice that a commission will be issued against him, sells his goods and pays him the produce before the two months are expired. Mr. Justice James Parke, in *Garland* v. *Carlisle* (*l*), speaking of the doctrine of relation, says: "The object of the legislature, in giving a retrospective operation to the assignment, was, to secure the equal distribution of the bankrupt's effects; and, for that purpose, it was deemed more beneficial to provide that the assignment should by relation defeat all mesne acts, at the expense of hardship in individual cases, than, by giving it only a present operation, to allow an opportunity to those fraudulent and improvident dispositions to which men in a state of bankruptcy almost invariably have recourse"—observations which apply at least with equal force to the case of insolvency.

Lord Chief Justice TINDAL.—This is an action brought by the assignees of an insolvent debtor to recover the value of certain fixtures alleged in one count of the declaration to have been sold to the defendant by the insolvent, and in another by the plaintiffs as his assignees. The defence offered at the trial was, a set-off for rent to a larger

(*k*) 2 Term Rep. 141. (*l*) Ante, Vol. 4, p. 67.

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amount than the sum sought to be recovered in this action, due from the insolvent to the defendant. It has further been objected in the course of the argument that the form of action is misconceived, for that, as the plaintiffs' claim is founded upon a disaffirmance of the contract, they should have brought trover and not assumpsit. That objection, however, was not made at the trial. It appears that the insolvent was committed to prison on the 13th April, 1832; that the sale of the fixtures (the transaction out of which this action arose) took place on the 14th; and that, on the 18th, the insolvent presented his petition to the insolvent debtors' court, and executed the usual assignment of his estate and effects to the provisional assignee. It is contended on the part of the plaintiffs, that, by the operation of the insolvent debtors' act, 7 Geo. 4, c. 57, the assignment has relation back to the first day of the imprisonment, in the same manner that in the case of a bankrupt the assignment has relation back to the time of the act of bankruptcy, and therefore that the plaintiffs have a right to adopt the act of the insolvent in the sale of the fixtures as their agent, and to bring an action for goods sold and delivered. The whole question is whether such relation exists or not; and, after the best consideration I

this realm and abroad, except &c., and of all future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be demised or bequeathed or come to him or her before he or she shall become entitled to his or her final discharge in pursuance of this act, according to the adjudication made in that behalf; or, in case such prisoner shall obtain his or her discharge from custody without any adjudication being made in the matter of his or her petition, then before such *prisoner* shall be at large and out of custody; and of all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid: which conveyance and assignment so executed as aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee." If the solution of the question depended upon this enactment, there appears to me to be nothing in it to shew an intention on the part of the legislature to give the assignment any relation to a time anterior to the date of the conveyance. It is contended that the introduction into the clause of the word "prisoner" necessarily implies that the legislature meant to deal with all the property the insolvent was possessed of at the commencement of his imprisonment: but the word is evidently used for the mere purpose of identifying the person. It is further contended, that, in the 63rd section of the bankrupt act, 6 Geo. 4, c. 16, which enacts "that the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him before he shall have obtained his

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certificate," the word "bankrupt" is used in the same place and sense as the word "prisoner" in the 11th section of the 7 Geo. 4, c. 57; and that, inasmuch as under the bankrupt law the assignment is held to have relation to the time of the act of bankruptcy, so here, the assignment must, upon the like principle, be held to have relation to the first day of the party's imprisonment. But it appears to me that the retrospective power and force of the assignment by the commissioners depends not upon the 63rd section of the 6 Geo. 4, c. 16, but upon the 12th section, by which it is enacted "that the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed an act of bankruptcy, by any creditor or creditors of such trader, by commission under the great seal, to appoint such persons as to him shall seem fit, who shall by virtue of this act and of such commission have full power and authority to take such order and direction with the body of such bankrupt as hereinafter mentioned, as also with all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary-hold as freehold, which he shall have in his own right *before he became bankrupt*, as also with all such interest in any such lands, tenements, and hereditaments as such

found in the 7 Geo. 4, c. 57, s. 11; that clause therefore must receive the same construction as any common conveyance would receive. We are then referred to the 16th section of the insolvent act, which directs the provisional assignee of the court "to take possession himself, or by means of a messenger of the said court, or other person or persons appointed by him, of all the real and personal estate and effects of every such prisoner as shall subscribe such petition and execute such conveyance and assignment as aforesaid, and, if the court shall so order, to sell or otherwise dispose of such goods, chattels and personal estate, or any part thereof, and of the real estate of such prisoner." This clause does not appear to me to carry the argument any further than the 11th section does. But it is said, that, unless we hold the relation contended for to exist, this manifest inconvenience will arise from the 30th section, viz. that the property of third persons in the hands of the insolvent at the time of his arrest or imprisonment, will become the property of the assignees; whereas, by the 32nd section, the insolvent will be deprived of the control over his own property only from the time of filing his petition and executing the assignment. If the legislature has so declared, we must decide in accordance with such declaration. But it is enough to point out the words of this 30th section—"If any person who shall petition the said court for his or her discharge from imprisonment under this act, shall, at the time of his or her arrest, or other commencement of such imprisonment, by the consent and permission of the true owner thereof, have in his or her possession, order, or disposition any goods or chattels whereof such prisoner was reputed owner, or whereof he or she had taken upon him or her the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such prisoner so petitioning, so as to become vested in the provisional assignee of the said court by the conveyance and assignment executed in pursuance of this

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act:" thereby distinctly pointing out that there is another period from which the calculation is to be made. The 32nd section enacts, "That, if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over shall be and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always that no such conveyance, &c., shall be so deemed fraudulent and void unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, &c., of petitioning the said court for his or her discharge from custody under this act." If the construction contended for on the part of the plaintiff be correct, and the property of the insolvent passes to the assignee by sale

Mr. Justice GASELEE.—Under the general assignment to the provisional assignee, only such property passes as the insolvent is possessed of at the time of its execution: and consequently the goods in question, which were sold before the date of the assignment, did not pass to these plaintiffs. The plaintiffs, therefore, could only bring the action as assignees of the debts of the insolvent, in affirmance of the contract entered into by him, and subject to all the equities to which he himself would have been subject.

Mr. Justice VAUGHAN.—I am of the same opinion. The relation suggested could only be created by the express words of the act or by necessary inference. No express words creating it are to be found in any part of the statute: and the inference is negatived by the 32nd section. By the form of action they have adopted, the plaintiffs have affirmed the contract of the insolvent, and thus, according to the case of *Smith* v. *Hodson*, let in the defendant's set-off.

Mr. Justice BOSANQUET.—The single question in this case is whether or not the property that is the subject of this action vested in the plaintiffs, as assignees, from the commencement of the imprisonment of Barnard, the insolvent. There are certainly no words to be found in the 7 Geo. 4, c. 57, expressly creating any such relation as is contended for. Neither, as it is said, are there any words in the 63rd section of the 6 Geo. 4, c. 16, having relation back to the act of bankruptcy. But the 12th and 63rd sections of that statute are to be read together; and the former does expressly create such a relation. It is to be observed also that there is this difference between the bankrupt and insolvent acts: the former was always (until lately) put in force in invitum; the latter, by the voluntary act of the party. There are undoubtedly many clauses in

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the insolvent act addressed to the prevention of fraud: but they do not appear to me to afford any inference in favour of the argument that it has been attempted to found upon them. This is not a question of fraud. I am therefore of opinion that the rule ought to be discharged.

Rule discharged (*n*).

(*n*) In *Bradbury* v. *Evans*, Exch. Nov. 18, 1834, where the plaintiffs sued as assignees of a bankrupt for goods sold and delivered by the bankrupt to the defendant after an act of bankruptcy, it appeared that the contract of sale by the bankrupt was made subject to a condition that the price should be paid to third persons. The court said that the plaintiffs could not, provided it were one entire contract, adopt it as to the sale, and repudiate it as to the mode of payment.

Monday, Nov. 24th.

Where, on a sale by auction of leasehold property, there

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BY an order of Nisi Prius, a verdict was entered for the plaintiff in this cause for *220l.*, subject to a reference of

the cause and all matters in difference between the parties; the arbitrator to have power to direct that a verdict should be entered for the plaintiff or defendant as he should think fit, and to put all questions of law which might arise upon his award: the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator accordingly made his award, finding as follows:—

"The declaration was for money paid by the plaintiff for the defendant's use, and for money received by the defendant to the plaintiff's use; to which the general issue was pleaded; and the action was brought to recover the sum of 100*l.* paid as a deposit on the purchase by auction of certain premises situate in the Piazza, Covent Garden, and held under a lease from the Duke of Bedford. The premises were described in the printed particulars of sale (on the back of which the plaintiff had signed the memorandum of the contract) as calculated for an extensive business in the carpet, haberdashery, drapery, paper, floor-cloth, upholstery, *grocery, tea-trade*, or coach-building. It was also stated in the same particulars that there was a clause in the lease—'the lessee to insure the premises for 3,000*l.*, and no *offensive trades to be carried on:* they cannot be let to a coffee-house keeper or working hatter.' Printed conditions of sale followed; and, by the sixth, it was provided, that, 'if through any mistake the estate should be improperly described or any error or mis-statement be inserted in that particular, such error or mis-statement should not vitiate the sale thereof, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase money, as a compensation either way.' By the last condition it was among other things provided, that, if the purchaser should neglect or fail to complete the purchase within a day which had expired previously to the com-

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mencement of the action, the deposit money should become forfeited to the vendor.

"The sale took place and the contract was signed on the 16th May, 1833. On the 10th June, an abstract of title was delivered by the vendor's solicitor to the plaintiff, which contained the following note of the proviso hereinafter set out:—'Proviso for re-entry in case of nonpayment of rent or nonperformance of covenants, or carrying on any particular trade without a license for that purpose under the hand of the said duke first had and obtained.' At the date of the sale and contract the lease was a valid and subsisting one. The plaintiff's solicitor made several objections, upon the abstract, to the completion of the purchase, which the arbitrator found to have been either insufficient in themselves or satisfactorily removed: but the plaintiff's solicitor never required to see the lease: and, on the 15th July, the plaintiff, so far as in him lay, rescinded the contract; and, having demanded back again his deposit without success, brought the present action.

"At the trial of the cause the lease was produced, and appeared to contain the following proviso:—'Provided always, that, if the yearly rent hereby reserved, or

the lessees (naming them), their executors, administrators, or assigns, should at any time during the last seven years of the said term assign or set over this indenture, or any part of the premises, and their estate or interest therein, without a license for that purpose under the hand of the said duke, his heirs or assigns, or on breach or nonperformance of any or either of the covenants and agreements thereinbefore contained, then and thenceforth, and in either of such cases, it should be lawful for the said duke, his heirs and assigns, to re-enter.'

"It was not proved before the arbitrator that the plaintiff at the time of the sale or of the signing the contract had ever seen the lease or heard it read, nor that he or his solicitor were aware of the terms of the proviso until the day of the trial. Evidence was offered on the part of the defendant to prove that the lease was produced at the sale, and that the proviso had been publicly read. This evidence was objected to by the plaintiff's counsel, and the arbitrator received it only to negative any wilful concealment or misrepresentation by the defendant of the terms of the lease: and the arbitrator found that none such was proved against him. No claim was made by the defendant before the arbitrator for damages for the nonperformance of the plaintiff's contract, nor any attempt to compel a specific performance."

Upon these facts, the arbitrator found that the plaintiff had good cause of action against the defendant, and he ordered that the verdict should be reduced to 100*l.*, for which sum, and the costs of the cause when taxed, he directed that the plaintiff should be at liberty to sign judgment on the sixth day of Trinity Term then next: and, if the facts above set out did not authorise the plaintiff, in the opinion of the court of Common Pleas, to rescind the contract of sale, then he directed the verdict to be entered for the defendant, and that he should be at liberty to enter up the judgment for himself. The arbitrator further found that

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no other matter in difference between the parties was brought into discussion before him than the said cause: and he directed that each party should bear his own costs of the reference, and that the costs of the award should be borne equally between them."

Mr. Serjeant *Taddy*, in Trinity Term, obtained a rule nisi that a verdict might be entered for the defendant on the above award, on the ground that, the arbitrator having expressly negatived wilful concealment or misrepresentation on the part of the vendor, the erroneous description in the particular of sale did not vitiate the contract, but only entitled the purchaser to a compensation under the sixth condition.—He cited *The Duke of Norfolk* v. *Worthy* (*a*), *Drewe* v. *Hanson* (*b*), *Stewart* v. *Alliston* (*c*), and *Trower* v. *Newcome* (*d*).

Mr. Serjeant *Wilde* shewed cause.—The conditions of sale did not convey to the purchaser competent information as to the nature of the property they professed to describe: they were calculated to lead the party to suppose that the two enumerated trades of a coffee-house keeper

noney, as a compensation either way"—only applies to cases where the circumstances afford a principle by which his compensation can be estimated—*Sherwood* v. *Robins* (*e*), *Brealey* v. *Hammond* (*f*). The true principle governing cases of this sort is laid down by Lord Ellenborough in *Tomkins* v. *White* (*g*) and *The Duke of Norfolk* v. *Worthy*. In the former his lordship says (*h*): "A little more fairness on the part of auctioneers in the forming of their particulars would avoid all these inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and, in favour of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected of them. The particulars are in truth like the description in a policy of insurance, and the buyer knows nothing but what the party communicates." And in *The Duke of Norfolk* v. *Worthy*, his lordship said (*i*), that, "in cases of this sort, he should always require an ample and substantial performance of the particulars of sale, unless they were specially qualified." In *Coverley*

(*e*) Moody & Malkin, 194.

(*f*) 1 Younge, 317. On a sale by auction of a life-interest in certain funds, the life was described in the particulars of sale to be that of a very healthy gentleman aged forty-eight. In a subsequent part of the particulars, the life was described as that of a healthy gentleman aged forty-eight, whose life was insurable. At the sale an insurance was guaranteed at five guineas per cent. On a bill by the vendors for a specific performance of the contract, it was proved that, shortly before the sale, the vendors had insured the life at a premium of 4*l.* 17*s.* 10*d.* per cent., though, according to the evidence of the actuary of the office where the life was so insured, the highest rate per cent. charged in London for a healthy life of that age was 4*l.* 6*s.* It was held by Lord Chief Baron Lyndhurst, that, with the knowledge of this fact, the vendors were not justified in describing the life as a healthy life, and that the guarantie did not do away with the effect of this description, though the purchaser admitted that he knew five guineas to be more than the premium usually charged.

(*g*) 3 Smith, 435.

(*h*) 3 Smith, 439.

(*i*) 1 Camp. 340.

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v. *Burrell*, Lord Chief Justice Abbott says (*k*): "It is of great consequence to the public that auctioneers who take upon themselves to describe in their particulars the property to be sold, should truly describe it; for, the buyers act on the faith of those descriptions. We ought not therefore to be astute in curing the defects which are apparent on the face of these particulars." In the present case the misdescription was in a most important particular, and eminently calculated to mislead the purchaser; and therefore, whether malâ fide or otherwise, the contract is thereby avoided. The conditions point only to *offensive* trades: whereas many of the trades enumerated in the prohibiting clause in the lease, are perfectly innocent. In *Stewart* v. *Alliston*, Lord Eldon refused to grant an injunction to stay proceedings in an action brought by a purchaser to recover the amount of his deposit; the description in the printed particular of sale being calculated grossly to deceive as to the real nature and value of the thing sold: and held that no compensation can be decreed in a case of great intentional misrepresentation, although so provided by the conditions of sale in case of "any error or misstatement" in the particulars. In *Sherwood* v. *Robins*, Lord Tenterden said (*l*): "In the case of a reversion

for an obiter opinion of Lord Eldon, on a motion to continue an injunction. In *Waring* v. *Hoggart*, Lord Chief Justice Abbott said (*m*): "I am of opinion that it is the duty of every person truly and honestly to represent that which he is to sell. A careful man and a lawyer looking at these conditions of sale might ask what were the terms of the leases which had been granted. The purchaser is informed by the statement in the conditions that the original lessee is restrained from carrying on these obnoxious trades, and that in the leases to be granted to him a similar covenant is to be entered into. None but a very careful person would suppose that it could be doubtful whether the persons to whom underleases had been already granted were bound in the same manner. I am therefore clearly of opinion that the plaintiff cannot be bound to take this title."—The fact of the lease being read by the auctioneer at the time of the sale, makes no difference. In *Jones* v. *Edney* (*n*), in the conditions of sale of the lease of a public house, it was described as "a free public house;" the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer; this lease was read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public house, and that the covenant about the beer had been decided to be bad: it was held that a purchaser *who heard the lease read over*, was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit. "Men cannot tell," said Lord Ellenborough, "what contracts they enter into, if the written conditions of sale are to controlled by the babble of the auction room. But here the auctioneer at the time of the sale declared that he warranted and sold this as a free public house. Under these circumstances a bidder was not bound to attend to the clauses of the lease, or to consider their legal operation."

(*m*) Ryan & Moody, 40. (*n*) 3 Camp. 285.

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Mr. Serjeant *Taddy* and Mr. *Cresswell*, in support of the rule.—The arbitrator having expressly found that no wilful concealment or misrepresentation was proved against the defendant, the question is whether the misdescription of the premises in the printed particulars of sale was not one that was provided for by the sixth condition. It may be conceded, that, where the misstatement is designedly made, the contract is avoided. Here, the particulars do not affect to give the terms of the prohibitory clause in the lease; they merely refer to it. The plaintiff might and ought to have demanded an inspection of the lease. The case of *The Duke of Norfolk* v. *Worthy* is precisely in point. Lord Ellenborough there said: "Here there was a clause inserted providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This he conceived was meant to guard against unintentional errors, not to compel the purchaser to complete the contract *if he had been designedly misled.*" In *Trower* v. *Newcome* specific performance was decreed against a purchaser of an advowson at a public auction, where the representation in the particulars of sale (complained of as calculated to mislead) was so vague and indefinite that it ought to have put

ever could be attached to it. So, here, the expression "offensive trades" was so large and vague that it ought to have put the purchaser upon inquiry as to what were considered offensive trades, with reference to the locality of the property. And it no where appears that the plaintiff when he made the purchase had any intention to carry on any of the prohibited trades upon the premises. In *Stewart* v. *Alliston* the misrepresentation was very gross: a rack rent was described as an improved rent. In *Drewe* v. *Hanson*, Lord Eldon says (*p*): "It is certainly to be observed that under the head of specific performance contracts substantially different from those entered into have been enforced. In the case of a contract for a house and wharf, it was considered that this court was specifically performing that man's contract by giving him the house without the wharf. So, in *Shirley* v. *Davis*, in the court of Exchequer, the subject of the contract was a house on the north side of the river Thames, supposed to be in the county of Essex; but which turned out to be in Kent; a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich; and, though his object was to be a freeholder of Essex, he was compelled to take it. So, in *Lord Stanhope's* case, the object was, to get an estate tithe-free; and yet Lord Thurlow obliged him to take it subject to tithes." Here, the purchaser has substantially got that which he bargained for, though possibly of a somewhat diminished value, and therefore he may be entitled to compensation only. A person contracting to purchase leasehold property, is always held to contract with notice of the clauses of the lease—*Hall* v. *Smith* (*q*), *Walter* v. *Maunde* (*r*). In *Oldfield* v. *Round* (*s*), on a

(*p*) 6 Vesey, 678.
(*q*) 14 Vesey, 426.
(*r*) 1 Jac. & Walk. 181. And see Sugden's Vendor and Purchaser, 9th edit. p. 9.
(*s*) 5 Vesey, 508.

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bill for a specific performance of a purchase of a meadow at an auction, it was objected that a way round and across the meadow was not specified: the Lord Chancellor said—"Certainly the meadow is very much the worse for a road going through it; but I cannot help the carelessness of the purchaser, who does not choose to inquire. It is not a latent defect." All these authorities manifestly shew that an erroneous description, in the absence of any suggestion of malâ fides on the part of the vendor, does not avoid the contract, so as to entitle the purchaser to recover back the purchase money (*t*).

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—

The question in this case arises upon the special facts found by the arbitrator on his award, and it is this—whether the plaintiff was at liberty, under the circumstances stated in the award, to consider the contract of sale to be rescinded; for, if rescinded, the plaintiff is entitled to recover the deposit as money had and received to his use: but, if the contract is still unrescinded and open, the

present action is not maintainable, but whatever injury the plaintiff has sustained by the misdescription must form the subject of a special action on the contract of sale. Now, the arbitrator having expressly found that no wilful concealment or misrepresentation was proved against the defendant, we must consider the case as standing clear from any fraud, and take the misdescription of the premises to have originated from either ignorance, inadvertence, or accident. The question, therefore, is narrowed to the single point whether the misdescription in the printed particulars of sale of the premises to be sold, was such as to entitle the purchaser to rescind the contract altogether, or whether it was such as was contemplated by the 6th condition of the printed particulars of sale, by which it was provided, "that, if through any mistake the estate should be improperly described, or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale thereof, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase money, as a compensation either way." It is extremely difficult to lay down from the decided cases any certain, definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that, where the misstatement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But, with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases: some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only—*Duke of Norfolk* v. *Worthy*, *Wright* v. *Wilson* (*u*): whilst other cases lay down the rule, that a

(*u*) 1 Moody & Rob. 207.

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misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale—*Jones* v. *Edney*, *Waring* v. *Hoggart*, *Stewart* v. *Alliston*. In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that, where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones* v. *Edney*, where the subject matter of the sale was described to be a "free public house," and the lease contained a proviso that the lessee and his assigns should take all their beer from a particular brewery: in which case the misdescription was held to be fatal. In the case under discussion the particulars represent the house as calculated for an extensive business in various trades therein enumerated: to which it is added, that "no offensive trades are to be

whatever. The latter restriction would extend to :nt trades of the most innocent and inoffensive kinds being exercised on the premises; such as, a flour r, or biscuit seller, or the like: yet such are the re- ions found to exist in the lease when it is first sub- d to the inspection of the purchaser. Under these mstances, it appears to us that a lease which is des- d as containing a restriction against offensive trades, ı lease containing restrictions, not only against offen- trades, but also against some trades that are inoffen- are not one and the same thing, but a different sub- matter of contract; and that, where a man purchases ıe former description, it may very well be supposed he would not have become the purchaser, whether ought for the purpose of carrying on trade on the ıises himself, or for a money investment, if he had rn the lease had contained the larger and more exten- restrictions. And, indeed, the very terms of the sixth ition of sale scarcely apply to a case where the dif- ıce of value is so uncertain and arbitrary as in the ent case. The condition that the parties are to pay low a proportionate value according to the average, comprehend a case where there is half an acre more ss than is described, or cases which resolve themselves simple calculations of that nature. But, how will it rn such a misstatement as the present? What action w can be framed upon it? It would at least involve purchaser in great difficulties. The lease being in hands of the vendor, he had peculiarly, and indeed usively, the means of knowledge of the exact restric- ı contained in it. The purchaser at the auction had :: for, the reading the lease at the auction by the ioneer has been decided to be no excuse for a mis- ription of the terms of the lease in the particulars of

And, as to any laches on the part of the purchaser ɔt sooner demanding an inspection of the lease, which

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was urged as an argument on the part of the defendant, he had not the most distant reason to suspect any misdescription, until the abstract was delivered: and then the suspicion would come too late; for, the question is, whether he was bound or not at the time the contract was made. If, indeed, there had been any waiver of the objection in this case, our decision would have been different: but a waiver should have been found by the arbitrator: and, so far as can be inferred from the facts found upon the award, the lease was never seen by the purchaser, nor the objection ever taken, until the trial of the cause. He stood then, as he might do, upon his legal right to recover the deposit. Upon the whole we see no reason to be dissatisfied with the arbitrator's award; and therefore the rule for entering the verdict for the defendant must be discharged.

Rule discharged (*x*).

(*x*) "If the vendor give in a particular of the rents, and the vendee say he will trust him, and inquire no further, but rely on his particular; there, if the particular be false, an action will lie: but, if the vendee [illegible] formance with compensation will not be enforced.

In Knatchbull v. Grueber, 1 Madd. 153, 3 Mer. 144, a specific performance of a purchase agreement was refused, no good title

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PRICE, Esq., *v.* RICHARD PEEK, Esq., JOHN HUMPHREY, Esq., WILLIAM JACKSON, and RICHARD JACKSON.

Monday, Nov. 24th.

A ca. sa. had been issued against the plaintiff, and delivered to the sheriffs of London, who thereupon made their warrant directed to one W. J., a serjeant at mace. The latter, attended by his son, R. J., proceeded to execute the warrant. R. J. followed the plaintiff from his residence into the city, and in order to effect his caption falsely charged him with felony, and caused him to be taken by a police officer to the police station, and there detained until he procured the attendance of W. J., who had the warrant in his possession. On the arrival of W. J. at the police station, the plaintiff was by him conveyed to White-Cross Street prison by virtue of the writ and warrant, and detained in custody thereon from the 31st December till the 5th January, when he obtained a judge's order for his discharge, on the ground that the arrest was illegal. Other writs having, however, been lodged against him, he remained in custody until the 28th January. In an action against the sheriffs, W. J., and R. J., the sheriffs justified the taking the plaintiff from the police station to White-Cross Street, and his detention there, under the writs. The jury having found a verdict for the plaintiff, with general damages for the whole of the trespasses and imprisonment charged in the declaration:—Held, that, although the sheriffs might be liable for the wrongful act of R. J., so recognized and acted upon by W. J.; yet that the plaintiff could not give these facts in evidence under the general replication, de injuriâ, as an answer to the sheriffs' pleas, so as to render them liable in damages for what passed subsequently to the taking of the plaintiff to the police station; but that, if he intended to avail himself of them for the purpose of converting an act legal in itself into an illegal act, he was bound by the rules of pleading to reply them specially.

TRESPASS for assault and false imprisonment. The first count of the declaration stated that the defendant, on the 31st December, 1832, with force and arms &c., assaulted the plaintiff, and with great force and violence pushed, pulled, and dragged about the plaintiff, and then and there forced and obliged the plaintiff to go in and along divers public streets and places to a certain police station situate and being &c., and then and there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause whatsoever for a long space of time, to wit, for the space of one hour then next following, contrary to the laws and customs of this realm, and against the will of the plaintiff, and under a false, malicious, and unreasonable pretence that the plaintiff had committed an offence punishable by law, to wit, felony; and also then and there took and conveyed the plaintiff in custody from the said police station to a certain prison called White-Cross Street prison, to wit, at &c., and then and there imprisoned the plaintiff, and kept and detained him in prison for a long time, to wit, from thence until and upon the 28th January, 1833, contrary to the laws and customs of this realm, and against the will of

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the plaintiff: by means whereof the plaintiff was prevented from performing his necessary affairs, was injured in his credit, put to expense in procuring his liberation, and sustained professional loss. The second count charged an assault and false imprisonment generally. The third was for a common assault.

The defendants Peek and Humphrey pleaded, first, the general issue to the whole declaration; secondly—as to the assaulting the plaintiff in the first count of the declaration mentioned, and seizing and laying hold of him, and taking and conveying him into custody from the said police station to the said prison called White-Cross Street prison, and there imprisoning the plaintiff, and keeping and detaining him there for the said time in the first count mentioned—that certain persons, to wit, R. M. C., G. D., and H. T., before the said time when &c., to wit, on &c., sued out of the court of our lord the king of the Bench a certain writ of our said lord the king called a ca. sa. against the plaintiff, directed to the sheriffs of London; by which said writ our said lord the king commanded the said sheriffs that they should take the plaintiff, &c. &c.; which said writ was afterwards, and before the return

being such sheriffs of London as aforesaid, and by the said warrant commanded him, that, by virtue of his said majesty's writ of ca. sa. unto them directed, returnable &c., he William Jackson should take the said plaintiff, &c.; which said warrant afterwards and before the return of the writ, and also before the said time when &c., to wit, on &c., was delivered to William Jackson to be executed in due form of law: by virtue of which said warrant, William Jackson, as such serjeant at mace as aforesaid, afterwards and before the return of the said writ, to wit, on the day and year in the first count of the declaration mentioned, being the said time when &c., within the bailiwick of the said sheriffs of London, to wit, at &c., in execution of the said warrant, gently laid his hand upon and seized and laid hold of the plaintiff to take and arrest him by virtue of the said writ and warrant, and did then and there arrest and take him into custody by virtue of the said writ and warrant, and took and conveyed him in such custody from the said police station, the same being in London aforesaid, to the said prison called White-Cross Street prison, the said prison being in London, and the lawful prison of the said sheriffs in that behalf; and they, the defendants Peek and Humphrey, being such sheriffs as aforesaid, there imprisoned the plaintiff, and kept and detained him in prison in execution there from thence until the 5th January then next ensuing, being part of the said time in the said first count mentioned, under and by virtue of the said writ, and for the cause therein specified: [The defendants Peek and Humphrey then proceeded to justify the detention of the plaintiff from the 5th to the 28th January, under a ca. sa. at the suit of one D. Hamilton]: without this that they the said R. Peek and J. Humphrey were guilty of the said supposed trespasses in the said first count and introductory part of this plea mentioned, at London aforesaid: and this &c.

The defendants William and Richard Jackson also

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pleaded severally the general issue to the whole declaration, and a justification "as to the assaulting the plaintiff in the first count of the declaration mentioned, and seizing and laying hold of him, and taking and conveying him in custody from the said police station to the prison called White-Cross Street prison," under the ca. sa. at the suit of R. M. C., G. D., and H. T., and the warrant thereupon directed to William Jackson; Richard Jackson acting therein as the servant and assistant of William Jackson, and by his command.

To the first plea pleaded by the defendants Peek and Humphrey, the plaintiff added a similiter: and to the second—protesting that the said R. M. C., G. D., and H. T., in the said second plea mentioned, did not sue or prosecute out of the said court of the Bench the said supposed writ of ca. sa. in the said second plea first mentioned, and that the same was not delivered to the defendants Peek and Humphrey, as such sheriffs, to be executed &c., and they did not thereupon make their said supposed warrant in writing; protesting also that the said D. Hamilton did not sue or prosecute out of the said court of the Bench the said supposed writ of ca. sa. in the said

riffs, the warrant thereon, and delivery of the same to William Jackson to be executed—replied de injuriâ &c.

At the trial before Lord Chief Justice Tindal, at the Sittings in London after the last Easter Term, the following facts appeared in evidence:—In the month of December, 1832, a writ of ca. sa. at the suit of Messrs. Casberd & Co. against the present plaintiff was delivered to the defendants Peek and Humphrey, as sheriffs of London, to be executed. The sheriffs thereupon made their warrant and delivered it to the defendant William Jackson, one of their serjeants at mace, who with the other defendant, Richard Jackson, his son, proceeded on the 31st December to the neighbourhood of the plaintiff's residence, and there waited for him, William Jackson having the custody of the warrant. The plaintiff was shortly afterwards followed into Fleet Street by the younger Jackson, who there caused him to be apprehended by a police officer on a false charge of felony, and taken to a police station, where he was at Richard Jackson's request detained until the latter procured the attendance of his father William Jackson at the station house. It was proved by the police officer who went from the police station with Richard Jackson, that, on finding his father at the plaintiff's door, Richard Jackson said—"I have got him: give me the warrant, and I can then swear I have had it *all the time;*" and that the warrant was then handed over by William Jackson to his son, in order to make it appear that it had been in his possession at the time of the caption; and William Jackson proceeded to the station. The charge of felony was then abandoned, and the plaintiff was carried to White-Cross Street prison by virtue of the writ and warrant before mentioned, and there kept in custody at the suit of Casberd & Co. until the 5th January following, when the plaintiff obtained a judge's order for his discharge as to that writ. Two writs against the plaintiff, at the suit of other persons, had been previously delivered

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to the sheriff; from one of which he was discharged by a judge's order, which had been opposed on an affidavit denying the facts above stated; and from the other, on motion for that purpose founded on the illegality of the caption, on the 28th January (*a*).

On the part of the defendants, the sheriffs, it was submitted that their plea of justification was admitted, and covered that part of the transaction in which they were concerned, viz. the arrest and detention under the writs and warrant; and that, as to the previous charge of felony made by Richard Jackson, it not being an act done under the authority of the warrant, or by a person deputed by them, the sheriffs were not responsible for it. A verdict having been found for the plaintiff, damages 100*l.*, expressly for the whole of the trespasses and imprisonment charged in the declaration—

Mr. Serjeant *Bompas*, in Trinity Term, obtained a rule nisi to enter a verdict for the sheriffs, or for a new trial.—Where the officer of the sheriff, the person to whom the warrant is addressed, is the party acting, the sheriff is to a large extent liable for his acts. But where, as in this

Mr. Serjeant *Spankie*, Mr. *Price*, and Mr. *R. V. Richards*, shewed cause.—They submitted that the first question was, whether the sheriffs were responsible for that part of the transaction which took place prior to the arrival of the plaintiff at the police station: not whether the officer was justified by the writ and warrant, but whether he acted under colour of them. Where the officer, under a writ commanding him to take the goods of A., takes the goods of B., the sheriff is undoubtedly liable, though the act of the officer is not an act done in pursuance of the warrant, but only under colour of it (*g*). Here, Richard Jackson, at the time he first took the plaintiff into custody, was acting under colour of the warrant; and his act was recognized and adopted by William Jackson on his arrival at the police station. The effect of the decision in *Barratt* v. *Price* is, that the arrest was illegal; and that the sheriff was so far a party to that illegal arrest, that the present plaintiff was entitled to be discharged from all the subsequent detainers. "Where the sheriff," says Lord Chief Justice Tindal, "has, *by his own act*, illegally arrested the defendant, the defendant is not in custody under the first writ; he is suffering a false imprisonment: and such false imprisonment, being no arrest in the original action, cannot enure as an arrest under the other writs lodged with the sheriff." All that *Drake* v. *Sykes* decides is, that, in order to affect the sheriff with the acts of the officer, it must be shewn that he was at the time employed by the sheriff. Here, the arrest and imprisonment, being one and the same transaction, form one entire act of trespass, not divisible, or capable of a partial justification. *Lucas* v. *Nockells* decides, that,

(*g*) See Smart v. Hutton, 2 Nev. & Man. 428, and the authorities there cited. "If the sheriff puts into the hands of his officer a writ, he and the officer are to be considered as one person, for anything the officer does under colour of that writ"—Per Mr. Justice J. Parke, in Smart v. Hutton. See also Saunderson v. Baker, 3 Wils. 309.

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under the general replication, de injuriâ, evidence may be given tending to shew that the act done by the defendants was not the act alleged in their plea as part of their excuse. The gist of the action is, not the illegal arrest and detention, but the false and scandalous pretence used in furtherance of the arrest. The plea going merely to the detention and not to the original caption, had the plaintiff simply replied to the justification, the replication would have been demurrable (*h*).

Mr. Serjeant *Bompas* and Mr. *Martin*, in support of the rule.—If Richard Jackson can be considered as the agent of the sheriffs, they will undoubtedly be responsiable for his acts; otherwise not. The law has well defined who are the agents of the sheriff in the execution of process, viz. those acting under his warrant in writing—an authority which cannot be delegated. In *Barratt* v. *Price*, the present plaintiff was declared entitled to his discharge because Richard Jackson was *not* the agent of the sheriff, and *therefore* the sheriff could not adopt his act, so as to render the subsequent detainers valid. In *Lucas* v. *Nockells* all the judges unite in saying, that, if

[redacted]

which rather partake of the *nature* of new assignments than are properly and strictly so. As, where a man abuses an authority or license which the *law* gives him, by which he becomes a trespasser ab initio; if the defendant pleads such license or authority, the plaintiff must reply the abuse"—citing *The Six Carpenters'* case (*o*), *Dye* v. *Leatherdale*, *Taylor* v. *Cole*, and *Gundry* v. *Feltham*. The justification having been proved, and there being no evidence to affect the sheriffs with that which took place previously to the arrival of the parties at the police station, the defendants Peek and Humphrey are clearly entitled to a verdict. But, supposing the sheriffs to be liable for the acts of the two Jacksons, yet, inasmuch as they are entitled to a verdict upon the issue joined on their special plea, and the jury have given entire damages for the whole of the trespass and imprisonment, the present verdict cannot be supported.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—The plaintiff in his first count declared against the four defendants for assaulting him, seizing him, dragging him about, and compelling him to go to a certain police station, and there imprisoning him, without reasonable or probable cause, for an hour, under a false and malicious pretence that he had committed a felony; and also for then and there taking and conveying him in custody from the said police station to White-Cross Street prison, and there imprisoning him from thence until the 28th January. To this declaration the two defendants Peek and Humphrey, separating themselves from the other defendants, plead, first, the general issue, not guilty, to the whole; secondly—as to the assaulting the plaintiff in the first count mentioned, and seizing him, and taking him in cus-

(*o*) 8 Rep. 146.

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tody from the said police station to White-Cross Street prison, and there imprisoning him—a justification under a writ of capias ad satisfaciendum issued out of this court against the plaintiff, directed to the sheriffs of London, and which writ they aver to have been delivered to them as such sheriffs, and that they made their warrant thereon directed to another of the defendants, William Jackson, then being a serjeant at mace of the said sheriffs, which warrant was delivered to William Jackson to be executed in due form of law: by virtue of which said warrant the said William Jackson gently laid hands on the plaintiff, and seized and laid hold him, to take and arrest, and did arrest and take him into custody by virtue of the said writ and warrant, and took and conveyed him from the said police station to White-Cross Street prison, and there imprisoned him. The replication—admitting the issuing of the writ, the delivery of the writ to the sheriffs, the making of the warrant, and the delivery of the same to the serjeant at mace—traverses the residue of the cause stated in the plea: that is, the replication in effect denies that the trespasses enumerated in the plea were committed under the warrant so delivered to William Jackson. At

make any case for the jury.—The second plea appears to us to be confined, by the enumeration of the trespasses in its commencement, to the period of time beginning with the arrest of the plaintiff by William Jackson at the police station, and terminating with the discharge of the plaintiff from his imprisonment in White-Cross Street prison; and so it has been taken in the course of the argument by the plaintiff's counsel. And this part of the trespass complained of appears to us to have been justified under the writ delivered to the sheriffs and the warrant made out by them to William Jackson, unless such arrest at the police station is made illegal by the previous misconduct of William Jackson—a question to which we shall presently revert: for, it was proved at the trial that the arrest at the station house was made by William Jackson, having the warrant at that time in his possession, and that the plaintiff was carried under the warrant by William Jackson from the station house to White-Cross Street prison, and was there confined under the same warrant, which are the several allegations contained in the plea. In order therefore to be entitled to a nonsuit, the defendants must shew that there was no evidence whatever for the consideration of the jury, of the two defendants, the sheriffs, having made themselves liable for the assault and imprisonment which took place previously to the arrival at the police station. We think, however, there was evidence given at the trial which made that question proper for the consideration of the jury under the general issue. The possession of the warrant by William Jackson, the serjeant at mace, at the time when Richard Jackson, his son, caused the plaintiff to be taken into custody by the police officer in Fleet Street; the delivery of the warrant by the father to his son whilst the plaintiff was still in custody at the station house, in order if possible to cover the illegality of such act of the son; the return of the father with the son to the station house, and his there enforcing the warrant:

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these were facts proper to be laid before the jury for their determination whether the illegal act of the son had been committed by the previous authority of the father. And, if the jury thought so, they would be right at all events in finding their verdict for the plaintiff as to that part of the trespass which was left uncovered by the justification; for, the act of the bailiff in the execution of a writ, though not justified by the writ, is the act of the sheriff himself; as, where he takes the goods of A. under a warrant upon a fieri facias against the goods of B. (*p*), or, as it has even been held (which is a much stronger case), where the bailiff makes an arrest after the return of the writ (*q*). We therefore think the rule cannot be supported in that part of it which prays that a verdict may be entered for the sheriffs.

But the rule, so far as relates to a new trial, stands upon a different footing; for, if the sheriffs are entitled to a verdict upon the issue joined on their special plea, then it follows, that, as part of the trespass complained of has been covered by the plea of justification, the entire damages which have been given by the jury for the whole of the trespass and imprisonment, cannot be supported. The

gality, availed himself of it, and proceeded to execute the warrant, such previous illegality would affect and run through the whole transaction, and make the subsequent proceedings illegal also. But the objection made on the part of the defendants, the sheriffs, is, that, even if such should be the facts in the case, the plaintiff is not at liberty to give them in evidence upon this state of the pleadings, as an answer to the defendants' pleas; but that, if he intended to avail himself of them for the purpose of converting an act legal in itself into an illegal act, he was bound by the rules of pleading to reply those facts specially: and we are of that opinion. The traverse de injuriâ suâ propriâ absque residuo causæ, puts nothing in issue but each and every fact alleged in the special plea and not admitted in the replication. In this case it puts nothing in issue but whether the assault and imprisonment mentioned in the plea were committed under colour of the writ and warrant or not. It is true, that, under the authority of the case of *Lucas* v. *Nockells*, the plaintiff may shew under that traverse that the sheriff did not act under the writ at all; that, although he had it in his possession, he acted at the time for a purpose and with an object entirely distinct from the execution of the writ; and that he only avails himself of it at the trial as an excuse for an illegal act. But there is no authority in that case, or any other, that, where the sheriff has really acted under the writ at the time, and avails himself of it in his plea, the plaintiff shall be at liberty under this replication to give the antecedent matter in evidence to render the subsequent arrest under the writ illegal. Such a replication, as it appears to us, confesses the arrest stated in the plea to have been made under the writ, but avoids it by new matter of fact, and therefore, like any other matter of confession and avoidance, must be specially pleaded. It is well established, that, where the plaintiff seeks to avoid any legal excuse for a trespass, by shewing matter subsequent which makes the defendant a trespasser

Effect of the general traverse, de injuriâ.

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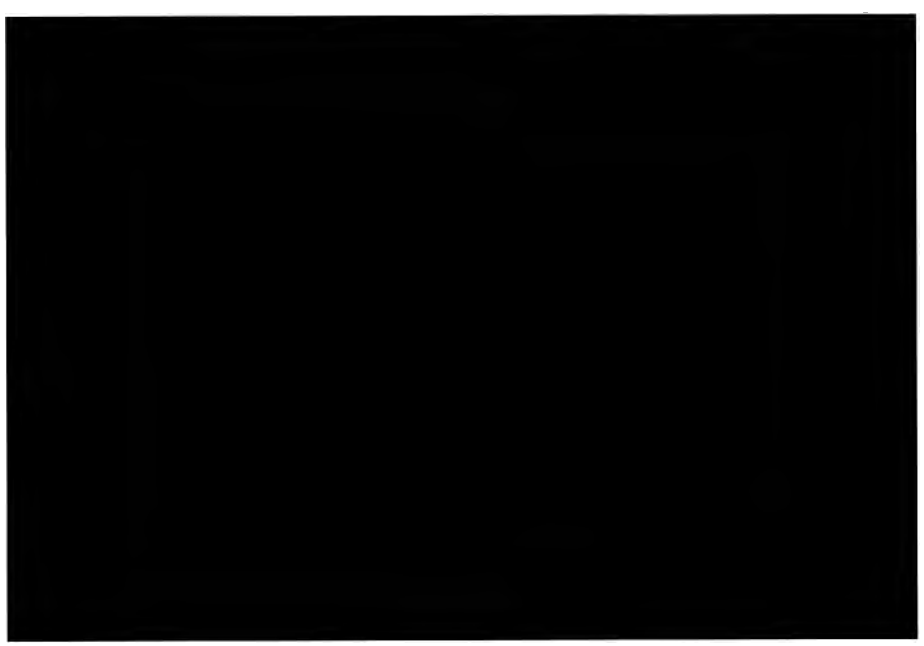
ab initio, he is bound to plead such matter, and cannot take advantage of it under the general traverse de injuriâ &c (r): and the case appears to us to be the same, upon principle, whether the act done by the defendant is precedent or subsequent to the execution of the writ; and the reason is undoubtedly the same in each case, viz. that the defendant ought not to be taken by surprise at the trial.

Upon the ground, therefore, that the present damages are entire for the whole trespass committed, and that the plaintiff is not entitled upon the present state of the pleadings to recover such damages for the arrest and imprisonment which actually took place under the writ, we think there must be a new trial, to ascertain the amount of damages for the taking to the police station, which forms the preceding illegal arrest and imprisonment, in case the jury shall be of opinion that such previous illegal arrest is brought home to the sheriffs: and we think the costs of the former trial should abide the event of the second.

Rule absolute accordingly.

(r) See the authorities collected in 1 Wms. Saund. 300 *d.*, n.



the year 1833, when a verdict was found for the defendants. A motion was made in Easter Term in the same year for a new trial, when the court directed the facts to be stated for their opinion upon a special case.

The declaration was in the usual form, for taking the goods and chattels of the plaintiff in the township of Thelwall, in the parish of Rancorn, and county of Chester. There were two avowries and cognizances by the defendant Mary Barton in her own right, and Pass as her bailiff. The first avowry and cognizance justified the taking as a distress for six years' arrears of an annuity or rent-charge of 200*l.* issuing out of the places in which &c., among other property, and alleged to be due to Mary Barton. The second justified as for a distress for six years' arrears of an annuity or rent-charge of 20*l.* issuing out of the same property, and alleged in like manner to be due to Mary Barton. Either party was to be at liberty to refer to the pleadings, which were to be taken as part of the case.

Settlement of T. P.

Thomas Pickering, being seised in fee of the premises hereinafter particularly described, by indentures of lease and release of the 9th and 10th May, 1775, purporting to be made between the said Thomas Pickering, of Thelwall Hall, in the county of Chester, Esq., and Mary his wife (the defendant Mary Barton), of the one part, and Samuel Egerton and John Way of the other part, after certain recitals, did for the consideration therein mentioned grant and release unto the said S. Egerton and J. Way, their heirs and assigns, all that the manor or lordship, or reputed manor or lordship, of Thelwall, in the county of Chester, with its rights, members, and appurtenances, and all and singular the messuages, lands, tenements, and hereditaments of him the said Thomas Pickering in Thelwall aforesaid, or whereof or wherein he the said Thomas Pickering, or any person or persons in trust for him, was or were seised or possessed of or entitled to for any estate of freehold or inheritance in possession, reversion, remain-

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of all his estates in Chester and Lancaster to trustees—

der, or expectancy, situate, lying, and being, or arising, or to be had, received, taken, or enjoyed in, within, or upon or out of Thelwall aforesaid or elsewhere in the said counties of Chester and Lancaster, or either of them, with the appurtenances—To have and to hold the same, with their appurtenances, unto the said S. Egerton and J. Way, their heirs and assigns, to the uses and upon the trusts &c., that is to say, to the use of the said Thomas Pickering and his assigns for and during the term of his natural life, without impeachment of or for any manner of waste, and with such power of leasing as was in the said indenture mentioned and contained; and, from and after the determination of that estate, by forfeiture or otherwise in the life-time of the said Thomas Pickering, to the use of the said S. Egerton and J. Way, and their heirs, during the natural life of the said Thomas Pickering—upon trust to support and preserve the contingent uses and estates thereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion should require; but nevertheless to permit and suffer the said Thomas Pickering and his assigns to receive and take the rents, issues, and profits of the said premises

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ion or abatement, &c.: which said annual sum or yearly rent-charge of 200*l.* thereby limited to the said Mary Pickering and her assigns for her life, was to be for and in the name and in nature of a jointure for the said Mary Pickering, and in lieu, recompense, and satisfaction and bar of all such dower or thirds at common law or by custom or otherwise, of, in, to, or out of all or any the manors, messuages, lands, tenements, or hereditaments whereof the said Thomas Pickering was then or should or might be seised for any estate of inheritance during the coverture between him and the said Mary Pickering then his wife; and to and for this further use, intent, and purpose, that, in case the said annual sum or yearly rent-charge of 200*l.* or any part thereof should at any time or times be in arrear or unpaid by the space of forty days next after any of the said feasts or days whereon the same ought to be paid as aforesaid, then and from thenceforth and so often, from time to time, although no formal or legal demand should be made thereof, or of the arrears thereof, it should and might be lawful to and for the said Mary Pickering and her assigns during the term of her natural life into and upon the said manor or lordship, messuages, lands, tenements, and hereditaments by the said indenture granted and released, or intended so to be, and into and upon every or any part thereof, to enter, and the same to have, hold, occupy, possess, and enjoy, and the rents, issues, and profits thereof, and of every part thereof, to have, receive, and take to and for her and their own use and benefit until she and they should therewith and thereby or otherwise be fully paid or satisfied the said annual sum or yearly rent-charge of 200*l.*, and all arrears thereof, and also such arrears of the same as should accrue during the time that she or they should by virtue of such entry or entries be in possession of the said premises, together with all such costs, charges, damages, and expenses as should be laid out and sustained or occasioned by or by reason of the nonpay-

in the name and nature of a jointure in bar of dower.

Power of entry by grantee if rent-charge in arrear forty days.

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ment thereof; such possession when taken to be without impeachment of waste: And as to, for, and concerning the said manor, messuages, lands, tenements, and hereditaments, &c., so subject unto and charged and chargeable with the payment of the said annual sum or yearly rent-charge of 200*l.* to the said Mary Pickering and her assigns for her life as aforesaid, and the said powers and remedies for the recovery thereof in the said indenture contained, from and immediately after the decease of the said Thomas Pickering, to the use of all and every or any of the children of the body of the said Thomas Pickering on the body of the said Mary Pickering his wife begotten or to be begotten, for such estate and estates, in such parts, shares, and proportions, manner, and form, and with, under, and subject to such provisoes, conditions, and limitations over, and charged and chargeable with the payment of such annual sums or yearly rent-charges or sums in gross, such limitations over to be for the benefit of some or one of the said children, as the said Thomas Pickering at any time or times during his life, or by any deed or deeds, instrument, or instruments in writing, with or without power of revocation, to be sealed and delivered by him

Subject thereto, to the use of such children as T. P. should by deed or will appoint;

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any writing purporting to be or in the nature of her last will ıd testament, to be signed and published by her in the pre- nce of and attested by three or more credible witnesses, ıould limit, direct, or appoint; and, in default of any such nitation, direction, or appointment as aforesaid, and in the eantime and until any such limitation, direction, or ap- ›intment should be made, and also subject to any such nitation or appointment where the same should happen ›t to be a competent entire appointment of the whole tate and interest of and in the said manor and premises, to ıe use of all and every the child and children of the body of e said T. Pickering on the body of the said Mary Picker- g, his wife, begotten or to be begotten, equally to be divided ›tween or among them if more than one, share and share ike, and they to take severally as tenants in common, ıd to the use of the several heirs of their respective ›dies lawfully issuing; and, in case there should be a ilure of issue of the body or bodies of any such child · children, then, as to the part or parts of such child or ıildren whose issue should so fail, to the use of the re- aining and other children equally to be divided between · among them if more than one share and share alike, ıd they to take also as tenants in common, and to the ıe of the several heirs of their respective bodies lawfully ıuing; and, in case there should be a failure of issue of the ›dies of all such children but one, or if there should be ıt one child, then to the use of such only remaining or only ild, and of the heirs of his or her body lawfully issuing; d, for default of such issue, to such uses, limitations, and pointments as the said T. Pickering should by any deed last will and testament duly executed, limit or appoint; d, for want of such limitation or appointment, to the use d behoof of the said T. Pickering, deceased, his heirs d assigns for ever: And it was by the said indenture of ease provided, declared, and agreed, that, notwithstand- ; the several limitations aforesaid to the issue of the said

and, in default of appointment by either, equally amongst the children.

In default of issue, to such uses as T. P. should by deed or will appoint.

Ultimate remainder in fee to T. P.

Power to T. P. to raise and appoint 15,000*l.* by deed or will—

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T. Pickering and the said Mary Pickering his wife, it should and might be lawful to and for the said T. Pickering at any time or times during his life, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing to be signed and published by him in the presence of and attested by three or more credible witnesses, to charge all and singular the said manor or lordship, or reputed manor or lordship, messuages, lands, tenements, hereditaments, and premises by the said indenture of release granted and released or intended so to be, or any part or parcel thereof, subject only to the levying and raising the said annual sum or yearly rent-charge of 200*l.* payable to the said Mary Pickering and her assigns for the term of her life as aforesaid, and prior to the several limitations to the issue of the said T. Pickering and the said Mary Pickering his wife in the said indenture of release before contained, with and for the payment of any sum or sums of money not exceeding the whole of the principal sum of 15,000*l.* of lawful money of Great Britain, unto any person or persons whom-

subject to the annuity or rent-charge to Mary Pickering.

[redacted]

ment of the said sum of 15,000*l.*, or so much thereof as shall be charged by virtue of this present power, and the interest thereof, by the person or persons who for the time being should be entitled to the freehold and inheritance of the said premises so to be demised, and so as the said T. Pickering should keep down during his life the interest of the sum or sums of money which should be charged on him by virtue of the same power, or should covenant and agree so to do by some deed or deeds, instrument or instruments in writing so sealed and delivered by him as aforesaid: And it was by the said indenture also provided, declared, and agreed that it should and might be lawful to and for the said T. Pickering at any time or times during his life, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, to be signed and published by him in the presence of and attested by three or more credible witnesses, to charge the said tenements and premises by the said indenture released, or any part or parcel thereof (but subject and without prejudice to the raising and payment of the said annual sum or yearly rent-charge of 200*l.* to the said Mary Pickering and her assigns for her life as aforesaid), with and for the payment of any annual sum or yearly rent-charge, or annual sums or yearly rent-charges, not exceeding the yearly interest of the said hereinbefore-mentioned sum of 15,000*l.* after the rate of 5*l.* per cent. per annum, unto any person or persons whomsoever, for the life or lives of any person or persons, and for such uses, intents, and purposes, as he the said T. Pickering should think fit in lieu of and satisfaction for the said sum of 15,000*l.* so by the said indenture of release directed to be raised as aforesaid, or any part thereof; and, for securing the due payment of such annual sum or yearly rent-charge, annual sums or yearly rent-charges

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as aforesaid, by the same or any other deed or deeds, instrument or instruments in writing so sealed and delivered and attested as aforesaid, or by such last will or testament, so signed, published, and attested as aforesaid, to limit or create any power or powers, remedy and remedies, by distress, entry, and perception of the rents and profits of the said premises, or any term or terms of years, or to make or execute any demise or demises (but subject and without prejudice as aforesaid) of the premises so to be charged, or any part or parcel thereof, for any term or number of years whatsoever.

This deed was duly executed by all the parties thereto.

On the 10th June, 1775, the said Thomas Pickering being still seised of the premises particularly described in the before-recited indentures of lease and release, duly made and published his last will and testament, which was duly attested by three credible witnesses, as follows:—

Will of T P., reciting the settlement,

"I, Thomas Pickering, of Thelwall in the county of Chester, do make this my last will and testament in manner following:—Whereas, I have in and by certain indentures of lease and release, bearing date the 9th & 10th May, 1775, conveyed all my real estates at Thelwall and

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shall find necessary the several sums of money and annuities following, and to pay and apply the same to the several persons following, that is to say, I give and bequeath to my wife Mary Pickering the yearly sum of 20*l.* during her life, over and above what I have already settled uper her: [Here followed various other bequests of legacies and annuities]: And, subject to the above and all other charges which shall be on my real estate at my death, and in case only of my dying without any issue lawfully begotten, I give and devise the same to Thomas Pickering, of Canterbury, son of my late uncle Alexander Pickering, and his heirs; but, in case I shall leave any child or children lawfully begotten, then it is my will that my said real estate do go to such child or children agreeable to the uses declared in the said indenture of release: And I do give and devise to my wife Mary Pickering my mansion-house and outhouses at Thelwall that I live in, with the garden, orchard, folds, and also the lands and premises that I now occupy there, being about six or seven fields—to hold to her and her assigns for the term of her natural life. Item—I give and bequeath to my wife Mary Pickering all and singular the goods, chattels, plate, linen, cows, horses, stock and effects of what kind soever that shall be in my house at Thelwall, or upon the said lands and premises, or that shall be usually occupied by me at my decease therewith, to and for her proper use and benefit. In witness whereof I have hereunto set my hand and seal, hereby revoking all former wills and codicils made by me."

Devise of additional annuity of 20*l.* a year, for life, to Mary Pickering.

Devise of mansion house &c. at Thelwall to Mary Pickering for life.

On the 5th December 1775, the said T. Pickering, being still seised as aforesaid, also duly made and published a codicil to the said will, which was also duly attested, as follows:—" Whereas, by my last will and testament, bearing date &c., I have devised all my real estate, upon certain contingencies therein mentioned, unto T. Pickering, of Canterbury, son of my late uncle A. Pickering, and to his

First codicil.

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heirs and assigns; and I have therein bequeathed the sum of 500*l.* a piece unto my nephews and neices Henry, Robert, Mary, and Helena Pickering, the sons and daughters of my late brother Henry Pickering, deceased: now it is my will and mind, and I do hereby revoke and make void the devise of my real estate unto or to the use of the said T. Pickering and his heirs, and also the said several legacies and bequests of 500*l.* a piece unto or in trust for my said nephews and neices; and I do give and bequeath unto my said nephew Robert Pickering and my said neice Helena Pickering the sum of 800*l.* a piece, to be paid and payable unto them at such days and times as the said legacies or sums of 500*l.* a piece were in and by the said will directed to be paid: I give and bequeath unto my servant John Heath the sum of 100*l.*, and to my servant W. Jefferson the sum of 20*l.*, to be paid to them within twelve months next after my decease in case they shall be in my service respectively at the time of my decease; and, subject to the specific and pecuniary legacies in and by my said will and in this codical bequeathed, and not hereby revoked, I give and bequeath all the rest, residue, and remainder of my personal estate unto my said nephew

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manor or lordship of Thelwall and all and every my messuages, lands, tenements, and hereditaments situate, lying, and being in Thelwall aforesaid, or elsewhere, and every part and parcel thereof, with their and every of their appurtenances, subject to the provision which in and by my said will I have made for my loving wife, to the several uses and intents and purposes hereinafter mentioned, that is to say, to the use of my said nephew Henry Pickering and his assigns for and during the term of his natural life, without any impeachment of or for any manner of waste; and, from and after the determination of that estate, by forfeiture or otherwise, to the use of the said S. Egerton and J. Way and their heirs during the natural life of my said nephew Henry Pickering, upon trust to preserve the contingent uses and remainders hereinafter limited from being defeated or destroyed; and for that purpose to make entries and bring actions as occasion shall or may require: but, nevertheless, to permit and suffer my said nephew Henry Pickering and his assigns to have, receive, and take the rents, issues, and profits thereof to his and their own use during his natural life; and, from and after the decease of my said nephew Henry Pickering, to the use of the first and other son and sons of the body of my said nephew Henry Pickering lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in priority of birth, and the several and respective heirs males of the body and bodies of such son and sons lawfully issuing, so as that the eldest of such sons and the heirs male of his body shall be always preferred and take before the younger of the same sons and the heirs male of his and their body and bodies; and, for default of such issue, to the use of my said nephew Robert Pickering and his assigns for and during the term of his natural life without impeachment of or for any manner of waste; and, from and after the determination of that estate, by forfeiture or otherwise, to the use of the

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said S. Egerton and J. Way and their heirs during the natural life of my said nephew Robert Pickering, upon trust to preserve the contingent uses and remainders hereinafter limited from being defeated or destroyed; and for that purpose to make entries and bring actions as occasion shall require: but, nevertheless, to permit and suffer my said nephew Robert Pickering and his assigns to have, receive, and take the rents, issues, and profits thereof to his and their own use during his natural life; and, from and after the decease of my said nephew Robert Pickering, to the use of the first and other son and sons of the body of my said nephew Robert Pickering lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in priority of birth, and the several and respective heirs male of the body and bodies of such son and sons lawfully issuing, so as that the eldest of such sons and the heirs male of his body shall be always preferred and take before the younger of the same sons and the heirs male of his and their body and bodies; and, for default of such issue, to the use of the said Thomas Pickering of Canterbury, and his assigns, for and during the term of his natural life, without impeach-

after another, as they and every of them shall be in priority of birth, and the several and respective heirs male of the body and bodies of such son and sons lawfully issuing, so as that the eldest of such sons and the heirs male of his and their body and bodies shall be always preferred and take before the younger of the same sons and the heirs male of his and their body and bodies: and, for default of such issue, to the use of my own right heirs for ever, and to or for no other use, trust, intent, and purpose whatsoever: Provided always, and I do declare my will and mind to be, that, notwithstanding any of the limitations hereinbefore contained, it shall and may be lawful to and for each of them my said nephews Henry Pickering and Robert Pickering, as also for the said Thomas Pickering, at any time after they shall severally come into the possession of the said manor or lordship, messuages, lands, tenements, hereditaments, and premises, by virtue of the limitations hereinbefore contained, by any his deed or deeds to be by him duly executed in the presence of two or more credible witnesses, or by his last will and testament to be by him signed and published in the presence of three or more credible witnesses, either before or after marriage with any woman or women which he shall take or be minded to take to wife, to grant or appoint any annual sum or yearly rent-charge not exceeding 100*l.* yearly, tax free, to be issuing out of all or any part of the said manor or lordship, messuages, lands, tenements, hereditaments, and premises, and to be payable unto or to the use of such woman or women which he shall happen to marry or take to wife, for the life or lives of such wife or wives only, for her and their jointure or jointures, and in lieu and bar of her and their dower and dowers, and so as such limitation or appointment of such jointure be without prejudice to the provision which in and by my said will I have made for my loving wife."

Second codicil.

The said Thomas Pickering, being still seised as aforesaid, afterwards duly made and published a second codicil

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to the said will, as follows:—" I, Thomas Pickering, do by this codicil or testamentary schedule, which I desire may be considered as part of my last will and testament, give and bequeath unto my nephew Henry Pickering my iron chest under lock in my study, with all the deeds and leases relating to the estate therein or elsewhere, together with the deeds, bond, notes, and things of all kinds that are in the two places under locks that are over or above the iron chest in the study; and, as I have left my dear Mrs. Pickering the Hall of Thelwall and all the lands I now hold, for her life, and, as it is not intended she shall cut down any timber on the premises, so it is my will and intention that she shall have timber from the premises she is to occupy, or any other part of the estate, for gates and stiles, or to repair, or, in case of accidents by fire, to rebuild any part of the premises left her for life, any thing in my will dated the 10th June, 1775, or in the codicil dated the 5th December, 1775, to the contrary notwithstanding."

Death of T. P. without issue.

On the 23rd July, 1776, the said Thomas Pickering died, without altering or revoking the said will and codicils, leaving his wife, the said defendant Mary Barton, him surviving, and without issue. After his death, the said defendant Mary Barton entered into and continued in possession

The question for the opinion of the court was—first, whether the said annuity or rent-charge of 200*l.* was extinguished by the devise to the said Mary Barton of a part of the premises upon which the said annuity was charged or out of which the said rent was to issue, and by the acceptance by the said Mary Barton of that devise. If the court should be of opinion that the said annuity was not extinguished, then the verdict was to stand for the defendants—arrears 1200*l.*; but, if the court should be of opinion that the annuity was extinguished, then a second question arose—whether the defendants were justified in making the distress in respect of the annuity of 20*l.* granted to the defendant Mary Barton by the above-recited will and codicil; and, if the court should be of that opinion, the verdict was still to stand for the defendants, but the arrears were to be reduced to 120*l.* If the court should be of a contrary opinion, the verdict entered for the defendants was to be set aside, and a verdict entered for the plaintiff, with 3*l.* damages.

The case came on for argument in Trinity Term last.

Mr. *John Jervis*, for the defendants.—The questions to be considered are—first, whether the avowant Mary Barton had, under the settlement of the 9th and 10th of May 1775, a right to distrain for the arrears of the annuity or rent-charge thereby created of 200*l.* per annum—secondly whether she had a right to distrain for the annuity of 20*l.* per annum given to her by the will of Thomas Pickering.

First point.

1. It will be objected, on the part of the plaintiff, that the rent-charge of 200*l.* per annum being charged upon all the estates of the settlor, and a portion of the land being afterwards devised to the grantee, and accepted by her, the rent-charge is thereby extinguished, according to the rule laid down by Littleton (*a*)—" If a man hath a rent-charge

(*a*) Section 222.

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to him and his heirs issuing out of certain land, if he *purchase* any parcel of this to him and his heirs, all the rent-charge is extinct, and the annuity also; because the rent-charge cannot by such manner be appropriated." What does Littleton here mean by a *purchaser?* Primâ facie, he could not mean a devisee; for, at the time Littleton wrote, a devise was not an ordinary mode of conveyance. It may be said that "purchase" must be understood in its larger sense—the acquisition by any means other than by descent. But it is clear that Lord Coke, in his commentary on that section, does not use the word in that sense: he puts a case where a person clearly acquires as a purchaser, and yet no extinguishment takes place—"A man seised of lands in fee taketh a wife, and maketh a feoffment in fee, the feoffee grants a rent-charge of 10*l.* out of the land to the feoffor and his wife and to the heirs of the husband, the husband dieth, the wife recovereth the moiety of her dower by the custom; the rent-charge shall be apportioned, and she may distrain for 5*l.*, which is the moiety of the rent. In which case two notable things are to be observed—first, albeit the dower be by relation or fiction of law above the rent, yet, when the wife recovereth her dower, she shall not have her entire rent out

ienation by his father dum non fuit compos mentis, ent shall be apportioned for the cause aforesaid (*c*)." evident, therefore, that the word *purchase* as used ittleton and by Lord Coke, though not being limited modern sense, an exchange for a pecuniary consider-, must be understood to mean an acquisition by the itary act of the party. In *Slater* v. *Buck*, the Master e Rolls (Sir Joseph Jekyl) says (*d*): "If one who has t-charge issuing out of lands purchases part of the , the whole rent is extinguished; but, if part of the come to him by descent, the rent shall be appor-d, because the law works no wrong. In the first case ent is extinguished, because the purchase is the party's account." And thus the rule is cited by all the text rs. In Bacon's Abridgment (*e*) it is said: "If a has a rent-charge, and *purchases* part of the land out ich the rent issues, the whole rent is extinguished."—part of the lands *descend* on the grantee of a rent-ge, the rent shall be apportioned according to the value e land; for, the grantee in this case is perfectly pas-and concurs not by any act of his to defeat the grant." vise is the voluntary benevolence of the devisor. In ase of a grant, where the grantee takes, an agree-is implied: but no agreement is precedent to a devise; not the act of the party taking; the whole is complete ie will and the death of the devisor, unless the devisee es: it is not necessary in pleading a devise to aver an otance. The intention of the testator in this case is ctly clear. He did not intend to extinguish the rent-ge. He expressly says he devises the house and pre-at Thelwall to his wife for life, over and above the

Co. Litt. 150. a.
Moseley, 257.
Bac. Abr. tit. "Rent," (M).
ee Bro. Abr. "Apportion-" pl. 28.—Vin. Abr. "Ap-nment," (A), pl. 1.—"If a man hath a rent-charge out of twenty acres, if he releases all his right in one acre, this extinguishes the grant in all"—Vin. Abr. "Ex-tinguishment," (A), pl. 4.

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provision he had made for her by the settlement.—The power of charging is in its creation subsequent to the rent-charge; and, as the devisor devised under the power, he could not do so otherwise than subject to the power, even if he had not expressly said so. "An appointment," said Lord Kenyon, in *Venables* v. *Morris* (*f*), "when executed, is to be considered in the same light as if it had been inserted in the original deed by which the power of appointment was created." Now, if the grant of the rent-charge, and the conveyance of part of the land out of which the rent issued, were made by the same deed, no extinguishment would take place (*g*).—At all events, the rent-charge in the present case is not a rent-charge within the meaning of Littleton. This is a rent-charge in bar of dower. Lord Coke, in his commentary on the 222nd section of Littleton, says—"The reason of this extinguishment is, because the rent is entire, *and against common right*, &c." Being against common right cannot apply to jointure, which stands on the same footing as dower; it is favoured in law. It would be hard upon the jointuress to interpret her right to the rent upon any other footing than that of dower. In *Knight* v. *Calthrope* (*h*), a man upon his marriage

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to the effect of a devise to the wife of a rent-charge, t recited in the will as being given in bar of dower: and e court resolved, that, "If lands are conveyed to a oman before marriage, for part of her jointure, and after arriage more land is conveyed to her for her full jointure, d in satisfaction of her whole dower, and afterward the isband dies, in that case, if the wife waives the land conyed to her use after her marriage, she shall have the nd conveyed to her before the marriage, and her dower so in the residue."

Second point.

2. The next question is, whether the avowant, Mary arton, had a right to distrain for the annuity of 20*l.* a ear given to her by the will of Thomas Pickering. The stator charges this rent upon all his lands save and expt those devised to his wife: it is therefore free from e objection that may be urged to the annuity or rentarge of 200*l.* per annum.

First point.

Mr. *Lloyd*, for the plaintiff.—1. The general rule of w is, that, where any part of the land out of which a ent-charge issues is acquired by the grantee, the rentarge is ipso facto extinguished. The single exception to is rule is, where the grantee takes by act of the law, as, it comes to him by descent. The distinction between e act of the law and the voluntary act of the party is early pointed out by Lord Coke (*k*): "But yet a rentarge by the act of the party may in some cases be apportioned. As, if a man hath a rent-charge of twenty illings, he may release to the tenant of the land ten illings, or more or less, and reserve part; for, the grantee ealeth only with that which is his own, viz. the rent, nd dealeth not with the land, as in case of purchase of art. So, if the grantee of an annuity or rent-charge of 0*l.* grant 10*l.*, parcel of the same annuity or rent-charge,

(*k*) Co. Litt. 148. a.

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and the tenant attorne, hereby the annuity or rent-charge is divided. And when the rent-charge is extinguished by his purchase of part of the land, he shall never have a writ of annuity; because it was by the grant a rent-charge, and he hath discharged the land of the rent-charge by his own act by purchase of part. And therefore he cannot by writ of annuity discharge the land of the distress, as Littleton hath before said. But, if the rent-charge be determined by the act of God or of the law, yet the grantee may have a writ of annuity. As, if tenant for another man's life by his deed grant a rent-charge to one for twenty-one years, cestui que vie dieth, the rent-charge is determined; and yet the grantee may have during the years a writ of annuity for the arrearages incurred after the death of cestui que vie, because the rent-charge did determine by the act of God and by the course of law—actus legis nulli facit injuriam. The like law is if the land out of which the rent-charge is granted be recovered by an elder title, and thereby the rent-charge is voided, yet the grantee shall have a writ of annuity, for that the rent-charge is avoided by the course of law." Here, the devisee takes by her own voluntary act: she is a purchaser; the

point. The first codicil amounts to an exclusion of the power of distress: it directs the mode of payment of the annuities.

2. With respect to the annuity of 20*l.* per annum, that is made payable out of the personalty; it is a mere personal legacy, and therefore not distrainable for. Although the will charges it upon the realty, yet the subsequent codicils make it chargeable on the personalty only. No power of distress or re-entry is given for it.

Mr. *Jervis*, in reply.—A power of distress is incident to the rent-charge. In *Buttery* v. *Robinson* (*i*), where a testator devised lands to his wife for life, remainder to his sons in fee, " subject to and charged and chargeable with the payment of the yearly rent or sum of 20*l.* to the defendant and her assigns during her life:" it was held that this was a charge upon the land, and that the grantee might distrain for arrears.

[The Court suggesting that the codicil might possibly operate as a re-grant of the rent-charge of 200*l.* per annum, and so make it (like the annuity of 20*l.*) to issue out of all the lands except those devised to the widow, a second argument was directed, and took place in the course of this term.]

Mr. Serjeant *Taddy*, for the avowant.—That there may be a re-grant under such circumstances, sufficiently appears from Lord Coke's commentary on s. 222 of Littleton, where he says (*k*): " If the grantee of a rent-charge purchase parcel of the land, and the grantor by his deed reciting the said purchase of part granteth that he may distrain for the same rent in the residue of the land, this amounteth to a new grant, and the same rent shall be taken for the like rent, or the same in quantity." So, in Haw-

(*i*) 11 J. B. Moore, 262, 3 Bing. (*k*) Co. Litt. 147. b., 148. a.

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kins's Co. Litt. it is said (*l*): "If the grantee of a rent-charge in fee purchase parcel of the land in fee, the whole rent is extinct, because it is entire and against common right, and issuing out of every part of the land, 'and wholly depends upon the deed which creates it without a tenure, against the natural course of the law, and therefore must be strictly pursued (*m*);' but, if the grantor grant that he may distrain for the same rent in the residue of the land, *this amounts to a new grant.* A. grants to B. a rent for life, and by the same deed grants that B. and his heirs shall distrain for the same rent; this amounts to a new grant of a rent in fee." Here, the words of the will whereby the testator gives his widow an additional rent-charge of 20*l.* per annum "over and above what he had already settled upon her," can have no meaning at all unless as operating a new grant. The intention of the testator clearly was that she should enjoy both.

Mr. *Lloyd*, contra.—The words of the will that are relied upon as operating a re-grant of the rent-charge of 200*l.*, are merely words of reference. It is not possible that the testator could have intended to charge both the annuities on the residue of his land. The testator professes

The questions which have been argued in this case are two—one, whether Mary Barton, the avowant, was seised of the annuity or yearly rent-charge of 200*l.* per annum for her life at the time of the distress made—the other, whether she was seised of the annuity or yearly rent-charge of 20*l.*; both which questions are raised by the traverses for that purpose in the pleas in bar by the plaintiff to the avowries.

As to the annuity or rent-charge of 200*l.*, the question is whether it is extinguished by the devise to the grantee of the annuity of part of the land out of which such annuity or rent-charge issues, coupled with the acceptance of such devise: and we are of opinion that such is the necessary legal consequence to be drawn from the facts stated in the case. By the settlement made in May, 1775, the avowant, then the wife of Mr. Pickering, became seised for the term of her natural life of a rent-charge or annuity of 200*l.* per annum issuing out of the manor of Thelwall and the lands belonging to the same; and under the will of the settlor, who died within a year after the settlement made, she became entitled for the term of her natural life to the mansion house at Thelwall and the lands occupied therewith, being part of the premises out of which the rent-charge issued; into which she entered after her husband's death. The rule of law is laid down in Littleton (*n*) thus: "If a man hath a rent-charge to him and his heirs issuing out of certain land, if he purchase any part of this to him and his heirs, all the rent-charge is extinct and the annuity also; because the rent-charge cannot by such manner be apportioned." And the reason of this rule of law is very fully explained by Lord Chief Baron Gilbert, upon feudal principles (*o*). On the part of the avowant it is contended that the present case does not fall within the principle above laid down, upon several grounds. In the first

(*n*) Section 222. (*o*) See Gilbert on Rents, p. 151.

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place, it is said that this is not a *purchase* within the meaning of the term in the section of Littleton above referred to. But, when it is considered that Littleton has before, in section 13, defined "purchase" to be—"the possession of lands and tenements that a man hath by his deed of agreement, into which possession he cometh not by title of descent from any of his ancestors or of his cousins, but by his own deed:" and, when Lord Chief Justice Coke, in his commentary on that section, explains it to be "always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or *purely of gift, for that is in law also a purchase,*" there is no ground for contending that a devisee who enters and enjoys the subject matter of the devise can be any other than a purchaser within the meaning of the section first above referred to. And again, Littleton himself, in section 224, takes the express distinction between the case where the land comes to the grantee by his own act, and where by descent and by course of law; in which latter case, the rent-charge shall be apportioned. And, as to the cases cited by the avowant's counsel, of *Knight* v. *Calthrope* and *Slater* v. *Buck*, they were not cases where the heir or devisee

if the grant of the rent-charge and the conveyance of part of the land out of which such rent-charge issues, had been by the same deed, no extinguishment could reasonably be supposed to take place. No authority is cited for this position; and, even admitting the law to be correctly stated, upon reference to the will, the devise in question does not appear to be made under the power of appointment reserved to the settlor in the event of his dying without issue, but to take effect out of the ultimate remainder in fee limited to him by the settlement: for, the power recited in the will is a power to charge, and not any power to appoint by deed or will. The charge on the estate, therefore, is made in execution of the power so recited; but the devise of the land is not made under any power at all, but is a direct devise of the land itself. It is urged lastly, that, whatever may be the effect of the devise as to creating an extinguishment, yet that the will is in effect a re-grant of the rent-charge of 200*l.*, as it treats that rent-charge as still actually subsisting; for, the devise of the rent-charge of 20*l.* is expressed to be—"over and above what I have already settled upon her." But it is unnecessary to determine whether such construction of the will can be sustained or not; for, if that construction be adopted, still the rent-charge of 200*l.* cannot be supposed to issue out of those lands which by the will are expressly devised to the wife, but out of the residue of the lands from which it was made to issue in its original creation. It is not therefore the rent-charge described in the avowry, which is made to issue out of the manor and all the lands of Thelwall, for it issues out of the manor and all the lands with the exception of those devised to the widow of the testator. As to the annuity of 200*l.*, therefore, we think the issue upon the seisin of the rent-charge, as taken upon these pleadings, ought to be found for the plaintiff.

As to the rent-charge of 20*l.* first devised by the will of Thomas Pickering, inasmuch as the devise is so worded as

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to make the rent issue out of all the lands save and except those devised by the same will to the wife, it is free from the objection taken as to the rent-charge of 200*l.* But the objection taken to the seisin of this rent-charge is, that, although at first it is made a charge upon the realty, yet the proper construction of the codicils to the will is to transfer it from the realty to the personal estate. We think, however, this is far from being clear: the construction of the will being quite compatible with the continuance of the rent-charge of 20*l.* per annum as a charge upon the land. Inasmuch, therefore, as the original charge on the land is clear, and the exemption of the land from this charge, and the transfer of it to the personalty, is subject to considerable doubt and difficulty, we think it must be held still to continue a charge upon the land.

The result is, that we think judgment ought to be given for the plaintiff on the issue raised as to the seisin of the 200*l.* rent-charge, but for the avowant as to the rent-charge for 20*l.* per annum.

Rule accordingly (*p*).

[redacted]

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Monday, Nov. 24th.

BEDFORD and Others, Assignees of AUSTIN, a Bankrupt, v. BRUTTON and Others.

The plaintiffs, as assignees of one J. S., a bankrupt, declared in covenant on a deed under the seal of the defendants and one H. P., since deceased, whereby they covenanted with J. S. before his bankruptcy to pay him certain yearly rents until he should grant certain leases which he had covenanted by that deed to grant. The defendants pleaded, that, by another deed of the same date with the former, and made between the defendants and H. P. of the one part, and J. S. and the several other persons whose names and seals were thereto subscribed and set of the other part, and also by certain articles of agreement set out in the plea and referred to and confirmed by the deed, J. S. and the several other persons mentioned in that deed had formed themselves into a society called the British Building Society, for the purpose of erecting a number of houses not exceeding forty, to be paid for out of a fund to be raised by the monthly subscriptions of the members; that J. S. had agreed to demise the land on which the houses were to be built on certain stipulated rents; and that the leases should be made to and executed by the trustees of the society (the defendants and H. P.) in trust for the benefit of the members thereof, until the completion of the same agreement. The deed set out in the plea contained a covenant on the part of all the members of the society, that, for the better indemnifying the trustees, each of the members would, when called upon at their general meetings, do and perform all such acts as might be necessary for indemnifying the trustees from all loss and damage they might sustain in the execution of the trusts:—Held, that the action was maintainable; the case differing from that of an agreement between partners, inasmuch as the damages when recovered by the plaintiffs would not go to any partnership fund, but would be their own separate property; and the damages not being payable out of any partnership fund, but by the trustees in the first instance on their personal contract, with a right to a future and uncertain indemnity from the other members of the society.

THIS was an action of covenant. The declaration stated, that, on the 25th July, 1827, at &c., by a certain indenture then and there made between Austin of the one part, and the defendants and one Parry, since deceased, of the other part [profert]—after reciting that the defendants and Parry, since deceased, on behalf of themselves and the other members of a certain society called The British Building Society, had lately agreed with Austin to take a lease of a certain piece or parcel of ground in the said indenture particularly described, and to build forty houses thereon, according to the stipulations thereinafter contained, Austin, for the considerations therein mentioned, did by the said indenture, for himself, his heirs, executors, and administrators, covenant, declare, and agree with and to the defendants and Parry, since deceased, their executors, administrators, and assigns, in manner following, that is to say, that, when and as soon as might conveniently be after the forty messuages and buildings thereinafter covenanted to be erected should be respectively built and completed fit for habitation, to the approbation of Austin or his surveyor, and the said other parties thereto, their

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executors, administrators, or assigns, should have performed all other the covenants and agreements in the said indenture contained on their parts to be done and performed, he, Austin, his executors or administrators, should and would, at the request and costs of the said several other parties thereto, grant and execute, or cause and procure to be granted and executed, one or more good or effectual lease or leases to such person or persons as they the said parties or the major part of the members of the said society for the time being should require, of certain pieces or parcels of ground, messuages, or dwelling-houses, and other erections and buildings in the said indenture more particularly mentioned and described, at certain rents, to wit, at the rents following, that is to say, at the rent of a peppercorn for the first year of the said term (say, to Michaelmas, 1828), at the clear rent of 50*l.* for the then following year, and at the clear yearly rent of 100*l.* for the remainder of the said term, that is to say, a certain term of seventy-five years wanting seven days in the said indenture mentioned: the said several rents were to be paid half-yearly free from all sewer and other rates, taxes, and deductions whatsoever (the then present land-tax, which

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› wit, on &c., at &c., entered into the demised :s with the appurtenances, and became and were ed thereof.—Averment of performance by Austin : plaintiffs as assignees of all things in the indenture r and each of their parts and behalfs to be per- , fulfilled, and kept—Breach, non-payment of rent space of five years of the said term, &c.

Breach.

defendants prayed oyer of the indenture in the tion mentioned, which was accordingly set out. ined, amongst others, a covenant that the members society should be at liberty when all the houses be built, to have the rent apportioned in such man- t the yearly rent of each house should not exceed ; and also a covenant, that, in case the shares to be y any members of the society should not amount to number within the period of twelve months from e of the indenture, then and in that case Austin if required by the trustees, resume the possession upation of so much of the said pieces or parcels of as would be sufficient to build ten houses, and . proportionate deduction from the rent thereby to be paid, and discharge the trustees from the ance of so much of the aforesaid covenants for g as should relate to ten of the said houses.

Pleas—first, non est factum.

first special plea then proceeded to state, that, at n meeting held at The Duke of Clarence, Hackney on Tuesday, the 19th June, 1827, Mr. H. Parry in ir, it was resolved that the articles hereinafter men- and set forth should be adopted for the formation ilding society, that is to say:

Second Plea.

1st.—That a society be established for the purpose of erecting

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peppercorn from this time till Michaelmas 1828, at 50*l.* per annum from thence to Michaelmas 1829, at 100*l.* per annum from thence to the end of the term, which term shall be for seventy-six years from Michaelmas 1826. The agreement for the leases of the land on which the said houses are proposed to be built, shall be made out to and executed by the trustees of this society, in trust for the general benefit of the members thereof, until the completion and fulfilment of the same.

6th. That the members of this society shall meet at &c., on the first Thursday in every month, at seven o'clock in the evening, and close at nine; and that each member shall pay or cause to be paid at every general monthly meeting, to the secretary or the chairman, the sum of 2*l.* 10*s.* for every share for which such member shall subscribe, or which he or she may acquire either by purchase or otherwise, and the sum of one shilling per share whether present or absent towards the expenses of such meeting—the first monthly payment to be made on the first Thursday in August next, and to be continued without intermission until the whole of the said houses shall be built and entirely paid for, together with all loans, interest, charges, and expenses attendant thereon, or arrears in respect thereof, for or on account of this society; at which period the whole of the said houses shall be distributed and divided amongst the several members according to the number of shares each member may then hold, such division to be made by ballot: any member possessing more than one share, and gaining the house ballotted for, is to be entitled to the succeeding house or houses adjoining to the number for his shares: from which time each member shall be put in full, quiet, and absolute possession of the house or houses to which such member shall be entitled,

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Articles of agreement between defendants and Austin.

Recitals.

The plea then proceeded to state, that, on the 25th July, 1827, by certain articles of covenant and agreement made between the defendants and Parry deceased, of the one part, and Austin (before he became bankrupt), and the several other persons whose names, hands, and seals were thereunto severally subscribed and set, of the other part—reciting that the said several persons parties thereto (by the defendants and Parry as trustees for and on their behalf) had agreed with Austin to take a lease of a piece or parcel of ground situate &c., and to build forty houses thereon according to the terms of certain articles of agreement bearing even date therewith, and made between Austin of the one part, and the defendants and Parry, as such trustees as aforesaid, of the other part; and that, at a meeting of the several parties thereto, held at &c., on &c., they the said several parties did enter into the preceding resolutions: and also reciting, that, at a meeting of the said several parties thereto that day held at the place appointed by the said resolutions, it was mutually agreed—

Confirmation of recited articles and agreements.

That the same should be confirmed, and that such articles, covenants, and agreements should be entered into by the parties as were thereinafter contained, in pursuance of such agreement: And, for better and more effectually carrying into execution the intention of the said several parties thereto, they the said Austin and the said several other persons parties thereto did, and each and every of them did, severally and respectively, and not jointly nor one of them for the others of them, ratify and confirm all the resolutions, articles, and agreements thereinbefore recited or mentioned; and each and every of them the said parties thereto, for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, declare, and agree with and to each and every the others of them and his and their respective executors, administrators, and assigns, in manner and form following, that is to say, that each of them the said parties thereto, his executors, administrators, and assigns, some or one of them, should and would, from time to time and at all times hereafter until the said society should be dissolved and at an end, well and truly observe, perform, fulfil, and keep all and every the clauses, articles, and agreements contained in the before-recited resolutions, and also all and every the clauses, articles, and agreements thereinafter contained, and which by him and them ought to be observed and performed,

Covenant for the performance of the resolutions, &c.;

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that no member be answerable beyond his own interest in the society;

that the committee should manage the affairs of the society;

Austin, defendants, and others appointed the committee.

according to the purport, true intent, and meaning of the same resolutions and of the now reciting articles of covenant and agreement: That no member of the said society should be answerable for the capital stock thereof beyond the amount of his or her own particular interest therein, nor to be liable to any costs in respect thereof after he or she should have paid up his or her full subscription money together with all such fines as might become due from him or her, or after he or she should have ceased to be a member of the said society according to the stipulations thereinafter contained: That books of accounts containing regular and proper entries of all monies received and paid by the treasurer of the said society, should be kept by their secretary for the inspection of the members thereof, under such restrictions as the committee for the time being should think proper: That the committee for the time being should have power to conduct and manage all the concerns of the said society, to make provisional rules and regulations concerning the same, to convoke general meetings of the members of the society, and remove agents, workmen, and subordinate officers thereof, subject to the approbation of the next general meeting of the members of the society after such removal: That no member should take or attempt to take advantage of any misnomer or other legal defect in any proceeding at law or in equity that might be instituted against him or her for any nonconforming to the existing rules of the society: That each member of the committee should be answerable for his own acts and defaults only, and not for the acts or defaults of any other or others of them: That the said Austin, G. C. and J. B. (two of the defendants), Parry and T. E., be, and they were thereby appointed, the committee to carry into effect the

[redacted]

of any such trusts as aforesaid: Provided always, and it was thereby further declared and agreed by and between all the said parties thereto, that, from and immediately after the said society had erected and built the said houses according to the true intent and meaning of the now recited articles, covenant, and agreement, and Austin should have granted or caused to be granted leases of the several houses to such parties as the major part of the said society should direct in that respect, the now recited indenture, and every matter, clause, and thing therein contained, should cease, determine, and be utterly null and void to all intents and purposes whatsoever; anything thereinbefore contained to the contrary thereof notwithstanding.

And the defendants further said that the said society in the said indenture mentioned, and the said society in the articles of agreement in this plea lastly mentioned, were one and the same society; and that Austin was during all the time aforesaid a member thereof as aforesaid; and that the defendants and Parry (deceased) entered into and made the said covenants in the declaration mentioned by and on behalf of themselves and Austin and others the members thereof as aforesaid, and for their use and benefit, and at their request as aforesaid, and not otherwise: And this &c.

Third Plea.

The third plea stated, in substance, that, at the time of making the indenture in the declaration mentioned, Austin was a member of the society in question, and a holder of four shares therein; and that the defendants and Parry entered into the covenants therein contained by and on behalf of themselves and Austin and others the members thereof, and as trustees for themselves and Austin and the said other persons as aforesaid, and not otherwise; and that Austin and the said other persons were jointly liable with the defendants to pay the damages to be recovered by reason of the alleged breach of the said covenant in the declaration mentioned: And this &c. The fourth plea was similar to the second, merely setting out the covenant on the part of the members of the society to indemnify the trustees.

Fourth Plea.

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The plaintiffs demurred generally to the second plea, and replied to the third and fourth, to which replications the defendants demurred specially. Joinders.

Mr. *R. V. Richards*, for the plaintiffs.—The question turns upon the construction of the deed set forth in the first special plea, which, it will be contended on the other side, operates as a release or defeasance of the deed declared on. The last-mentioned deed recites that the defendants and Parry had on behalf of themselves and the other members of the society in question, agreed with Austin to take a lease of certain ground in the indenture described, at certain stipulated rents. The deed which is said to amount to a release or defeasance of that deed, was executed on the same day: it recites that the members of the society, by the defendants and Parry, as trustees on their behalf, had entered into the agreement with Austin; and it confirms that agreement. For many purposes, the second deed was evidently intended to be taken as a part of the first, and to carry it into effect. It clearly could not have been intended to operate as a release or defeasance of the first deed. In no case will one deed operate as a release of another covenant, unless the parties are

ie obligee would never sue upon the obligation, is a e; or, if it be with condition never to sue, it will be asance, though there be no words not to sue in the tion, but only in the condition of it; and the reason is, to avoid a circuity of action; because there one l precisely recover the same damage that he had suf- by the other's suing the bond. A. is bound to B., . covenants never to put the bond in suit against A.; rwards B. will sue A. on the bond, he may plead the ant by way of release. But, if A. and B. be jointly everally bound to C. in a certain sum, and C. cove- rith A. not to sue him, that shall not be a release, but nant only; because he covenants only not to sue A., oes not covenant not to sue B., for the covenant is release in its nature, but only by construction, to circuity of action; for, where he covenants not to sue ie still has a remedy, and then it shall be construed ovenant, and no more." In *Gawden* v. *Draper* (c), aintiff declared on an indenture whereby the defen- covenanted with him that S., the wife of the defend- hould be permitted to live separate from the defend- ntil the defendant and S. by writing should give to each other that they would again cohabit; and ie the defendant, until such notice should be given ir desires to cohabit as aforesaid, would pay to the iff, for the maintenance of S., 300*l.* per annum. lefendant pleaded in bar another indenture between efendant and S. of the one part, and the plaintiff of ther part, reciting the first indenture, and that the dant and S. did then intend to cohabit, and did at ime cohabit, and expressing that it was the true and meaning of the parties to the indenture de- l on, that, so long as the defendant and S. should to cohabit, the annual payment should cease: and

(c) 2 Ventris, 217.

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that the plaintiff did by the last-mentioned indenture covenant and agree with the defendant, that, so long as the defendant and S. should cohabit, he should be saved harmless from the said 300*l.* annual payment. The court held, that, " unless the cohabitation had been according to the first indenture, it was no bar; for the last deed had not taken away the effect of the former: a latter covenant cannot be pleaded in bar of a former. But the defendant must bring his action upon the last indenture if he would help himself." In *Cage* v. *Acton* (*d*), it was held that a bond given by a man to a woman in consideration of their intermarriage, conditioned that if she survived him he would leave such a sum of money, is only *suspended* but not *extinguished* by the intermarriage. Mr. Justice Gould, in giving his judgment, there says: " If a feme executrix take debtor to husband, it is no release of the debt, because it would be a devastavit; but here the law will interpose and take away the inconsistency of the debtor and debtee between husband and wife, by taking it into its own custody:" and he quoted the case of *Dorchester* v. *Web* (*e*)—" A man obligor marries a woman obligee, who are afterwards divorced; the debt revives, and the man shall be sued by the woman again; and though here

tum, and is no more than a provision in case of chattel, which the law would make in case of inheritance. In the case of *Smith* v. *Stafford* (*f*), though it was urged to be a present promise and lien releasable by the wife, yet judgment was that such promise was not released by the marriage, against the opinion of Hobart: so here, the justice of the law will preserve this debt for an honest intent. In Noy, it is said it would be otherwise in a bond—quod fuit concessum: but that is not said in any of the other books that report it; and I see no difference. *The law will not work a release contrary to the intent of the parties.*" If the obligee of a bond covenant not to sue one of two joint and several obligors, and, if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor—*Dean* v. *Newhall* (*g*). A covenant not to sue one of two joint debtors does not operate as a release to the other—*Hutton* v. *Eyre* (*h*). Lord Chief Justice Gibbs, in delivering the judgment of the court, there says: "The principle on which the covenant not to sue is held to operate as a release, is, to avoid circuity of action; but it goes no further." In *Solly* v. *Forbes* (*i*) it was held that a release must be construed according to the particular purpose and intent for which it was made. There A. and B., being in partnership, and in insolvent circumstances, A. alone gave a general release by deed to the plaintiffs, to whom himself and B. were jointly indebted, with provisions that it should not operate to release or prejudice any demands which the plaintiffs had against B., either separately or as a partner with A., on the joint effects of A. and B., or either of them, and that they might commence an action at law either against A. jointly with B. or A.

(*f*) Hobart, 216, Hutton, 17, 1 Brownlow, 18, Noy, 26, Goldsborough, 21.

(*g*) 8 Term Rep. 168. And see Cocks v. Nash, 2 Moore & Scott, 434, 9 Bing. 341.

(*h*) 6 Taunt. 289.

(*i*) 4 J. B. Moore, 448, 2 Brod. & Bing. 38.

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separately, for the purpose of enabling the plaintiffs to recover payment from the joint estate of A. and B. or from B.'s separate effects. In an action by the plaintiffs against A. and B., this release having been pleaded by A., and set out on oyer in the replication, with an averment that the action was prosecuted against A. jointly with B. for the purpose of enabling the plaintiffs to recover payment of monies due from B. and A. to the plaintiffs, either out of the joint estate of B. and A., or from B. or his separate estate—it was held, on general demurrer to the replication, that the release was no bar to the action. Lord Chief Justice Dallas says (*k*): "In *Morris* v. *Wilford* (*l*), it was expressly decided 'that a release should be construed according to the particular purpose for which it was made.' In *Payler* v. *Homersham* (*m*), Lord Ellenborough adopted the position that the general words of a release may be restrained by the particular recital. 'Common sense,' said his lordship, 'requires that it should be so, and in order to construe any instrument truly you must have regard to all parts, and especially to the particular words of it.' The case cited from Rolle (*n*) to this effect, though said to have been denied by Lord Holt to be law (*o*),

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B.'s wife was interested, he F. giving sureties, viz. the said D., E., and C., for payment of an annuity to B.'s wife; and it was thereupon witnessed, that, in consideration of the covenants &c., the said D., E., and C., and each and every of them, covenanted with A., B. and his wife, and C., to pay the annuity. Then followed covenants by A., B. for himself and his wife, and C., severally, for quiet enjoyment, and for executing an assignment to F. when required. In an action brought by A. and B. (*after the death of C.*) for breach of the covenant to pay the annuity, it was held, that, at least after C.'s death, A. and B. might sue D.'s executors (D. and E. being also dead) for non-payment of the annuity, *though the covenant for such payment was entered into both by and to C.* In the present case, the covenant to indemnify the trustees, contained in the second deed, which will probably be relied on by the other side, is qualified: the parties covenanting, "*when called upon at any of their general meetings,* to do and perform all such acts as might be necessary fully and completely to indemnify the said trustees from all loss or damage they might sustain or be put to in and about the execution of the trusts aforesaid:" and there is no allegation on the record that there was any call on the members of the society at any general meeting so to indemnify the trustees.

Mr. *F. Kelly*, for the defendants.—The question here is not, as in *Lacy* v. *Kinaston*, and the other cases to the same effect cited on the part of the plaintiffs, whether the second deed operated as a release of the former: it is not so pleaded. But the question is, whether one partner can maintain an action against the rest of the firm to recover money which he himself is jointly with them liable to pay. In *Dean* v. *Newhall* it never could have been contended that the defendant might have maintained an action against the plaintiff to recover the same damages that the latter

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sought by that action to recover against him: and therefore that case is no departure from the principle here contended for. *Rose* v. *Poulter* is rather an authority in favour of the defendants. In the present case there is a perfect community of interest between Austin and the defendants. One partner clearly cannot sue upon a consideration given to the whole firm. Where there are mutual rights, even in the case of a contract under seal, a court of law will look to the equitable situation of the parties—*Bottomley* v. *Brooke* and *Rudge* v. *Birch* (*q*). Mr. Justice Ashhurst, in *Winch* v. *Keeley*, says (*r*): "It is true that formerly the courts of law did not take notice of an equity or a trust; for, trusts are within the original jurisdiction of a court of equity: but of late years it has been found productive of great expense to send the parties to the other side of the Hall; wherever this court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then, if this court will take notice of a trust, why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned: but this court will take notice of a trust, and consider who is beneficially inter-

the record both as plaintiff and defendant. An action cannot in any case be brought by a plaintiff where the defendants might sue the plaintiff for contribution in the event of a recovery against them. Here, the plaintiff himself, as one of the members of the society, expressly covenants to indemnify the trustees, the present defendants. In *Goddard* v. *Hodges* (*s*), A. B., at the request of the plaintiff, and for his benefit, became the holder of shares in a company to which the plaintiff was solicitor. The plaintiff paid the deposits and all expenses on the shares. In an action by him against a member of the company for money laid out for the use of the company in advertisements and journies—it was held that the plaintiff could not recover, he being the real, though A. B. was the ostensible, partner. And in *Bosanquet* v. *Wray* (*t*) it was held that the partners in one house of trade cannot maintain an action against the partners in another house of trade, of which one of the partners in the plaintiffs' house is also a member, for transactions which took place while he was partner in both houses; and that whether the action be brought in the lifetime of the common partner or after his decease.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—

The point raised upon the pleadings in the present action is this—that it appears from the first special plea that the action is virtually and substantially an action of covenant brought by the assignees of one partner who has become bankrupt, against three of his partners, to recover damages against them, to which the plaintiff himself must be contributory if he succeeds; and, undoubtedly, if this account of the situation of the parties is correct, the action would

(*s*) 1 Cr. & Meeson, 33, 3 Tyr. 209. (*t*) 6 Taunton, 597.

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not be maintainable at law. But, upon looking at the deed upon which the action is brought, and the deed set out in the defendants' plea, together with the articles referred to in the latter deed, and which may be considered as incorporated therein, we are of opinion that there is no ground for the objection which has been made. The deed upon which the declaration proceeds, contains a covenant under the seal of the three defendants and one Henry Parry, since deceased, with Austin before his bankruptcy, that they would pay to Austin the several yearly rents in the indenture mentioned, until he, Austin, should grant the leases which he had covenanted by that deed to grant. Here, therefore, is an express covenant for payment of a certain sum under the seal of the defendants; and it is unnecessary to observe that this forms the fit and proper ground of an action of covenant in a court of common law, unless sufficient matter is brought forward in the plea to avoid it. Now, the substance of the first plea is this, that, by another deed of the same date with the former, and made between the defendants and Parry of the one part, and Austin and the several other persons whose names and seals were thereto subscribed and set of the

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society, that, for the better indemnifying the trustees, each of the members would, when called upon at their general meetings, do and perform all such acts as might be necessary for indemnifying the trustees from all loss and damage they might sustain in the execution of the trusts. The first observation that arises on this state of the pleadings is, that, if we hold the action to be not maintainable, we defeat the very object and intention of the parties. The object was, that Austin, who was an equal contributor to the common funds of the society, by his monthly subscriptions, with the other members, and who besides that contribution gave up his land for the general purposes of the society, should receive an annual remuneration for the use of his land in the place of rent, separate and distinct from his profits as a member of the society: and, in order to avoid the difficulty of any direct agreement between himself and each of the other members, he covenants with the trustees to grant the leases when the houses shall be finished; and they covenant with him on the other hand to pay certain annual sums in the mean time. Unless, therefore, some unanswerable objection can be brought forward against the maintenance of this action upon the covenant, the intention of the parties will be best effectuated by allowing it to be maintainable. It is objected that the damages recovered for the breach of covenant will be borne out of the common fund in which Austin is interested. The answer is, that the damages are in the first instance to be borne by the defendants, who are to be indemnified at a future and uncertain time, in such manner as the members of the society at a general meeting shall direct. The rent is reserved at certain stipulated times. The meetings of the society are to be held quarterly. It never was intended that the landlord should wait till the quarterly meeting, when the day of payment occurred before it. It is urged, that, to avoid circuity of action, the present action is not maintainable; for, if the

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plaintiffs recover on the covenant made with Austin, the defendants may recover back again from him the damages they have sustained. But this is not so: for, each member has covenanted only to do what he shall be called upon to perform at a general meeting, in order to indemnify the trustees. The agreement, therefore, between Austin and the defendants differs from an agreement between partners in two important points—the damages when recovered by the plaintiffs do not go to any partnership fund, but are their own separate property; and the damages are not to be paid out of any partnership fund, but by the trustees on their personal contract. The cases of *Rudge* v. *Birch* and *Bottomley* v. *Brooke*, referred to by the defendants' counsel, go no further than this, that the courts of law will so far take notice of the existence of a trust as to let in against the plaintiff (the trustee) that which would be a valid defence against the cestui que trust. But those cases have never been extended; and they certainly furnish no authority for considering the cestuis que trust the defendants upon the record where such a proceeding would defeat the whole object of the parties. And the case of *Andrews* v. *Ellison* (*u*) is a strong authority to shew that this action is maintainable. There, in an

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Monday, Nov. 24th.

Where in the indentures of a fine lands were described erroneously as situate in a parish different from that mentioned in the deed to lead the uses—The court refused to amend, the error being cured by the 3 & 4 Will. 4, c. 74, s. 7.

LOCKINGTON, Conusor, SHIPLEY and Wife, Conusees.

IN a fine levied between these parties, the property was described in the deed to lead the uses as being in the parish of Isham, and in the indentures of the fine as in the parish of Burton Latimer.

Mr. *W. H. Watson*, upon an affidavit stating that the lands intended to pass were situate wholly in the parish of Isham, and that Burton Latimer had been inserted in the fine by mistake, now moved that it might be amended by substituting the right parish.—He referred to the 3 & 4 Will. 4, c. 74, s. 7, by which it is enacted, "that, if it shall be apparent from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission." This clause, he submitted, only embraced cases where the error, misdescription, or omission *appeared upon the face of the deed;* whereas here, there was no error or misdescription apparent on the face of the deed, without the aid of the affidavit: and therefore the court had still power to order the amendment prayed, in pursuance of the reservation contained in the 9th section of the statute.

Lord Chief Justice TINDAL.—This motion appears to

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LOCKINGTON Demandant.

me to be quite unnecessary. The 7th section of the 3 & 4 Will. 4, c. 74, operates as an amendment in all cases where it shall appear from the deed to declare the uses of a fine, that there is an error in the names of the parties, or a misdescription or omission of lands intended to pass by such fine. Here, it does appear from the deed to lead the uses that the property in question is erroneously described in the indentures of the fine as being situate in Burton Latimer. If this be not held to be a case within the act, it will be found to be perfectly nugatory; and we shall be called upon, as before the passing of the act, to amend in every case where the ingenuity of the conveyancer can suggest any shadow of objection.

The rest of the court concurring—

Amendment refused.

Monday, Nov. 24th,

Where a plaintiff, knowing the defendant to be abroad

PIGOU v. DRUMMOND.

THE defendant being abroad, but represented by an attorney in this country, the plaintiff, knowing this, and without communicating with the defendant's attorney, sued

tiously by procuring the sheriff to return non est inventus to the writ, they were of opinion that the outlawry ought to be reversed at the expense of the plaintiff.

Rule absolute (*a*).

(*a*) Where a plaintiff proceeded against a defendant in this country and in America for the same cause of action, and the defendant was arrested in America, and took the benefit of the insolvent act here, the court would not on that ground set aside the proceedings to outlawry which had taken place here, but left the defendant to plead these facts; it being sworn that he went abroad to avoid his creditors. Probert v. Rogers, 3 Dowl. P. C. 170.

VERE v. GOLDSBOROUGH.

Monday, Nov. 24th.

To a declaration consisting of two counts—the first against the defendant as the acceptor of a bill of exchange—the other on an account stated—the defendant (without a rule to plead several matters) pleaded "that he did not accept the bill of exchange in the declaration mentioned; and, for a further plea, that he did not account with the plaintiff as in the declaration was alleged." The plaintiff signed judgment as for want of a plea:—Held, that the informality could only be taken advantage of on special demurrer.

THE declaration consisted of two counts—the first charging the defendant as the acceptor of a bill of exchange—the second upon an account stated. The defendant, without having obtained leave to plead several matters, pleaded as follows: "And the said defendant, by T. K., his attorney, saith that he did not accept the said bill of exchange in the said declaration mentioned: and, for a further plea, saith that he did not account with the said plaintiff as in the said declaration is alleged." The plaintiff having signed judgment as for want of a plea—

Mr. *Mansel*, on a former day, obtained a rule nisi to set aside the judgment for irregularity.

Mr. Serjeant *Wilde* shewed cause.—He referred to the 9th rule of the "first general rules and regulations" in pleading, of Hilary Term, 4 Will. 4, which provides, that, "in a plea or subsequent pleading intended to be pleaded

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in bar of the whole action generally, it shall not be necessary to use any allegation of 'actionem non,' or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of 'precludi non,' or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action:" and he submitted that, there being no rule to plead several matters, and the pleas in question not being expressed to be pleaded distributively, the irregularity was one that the plaintiff was entitled to take advantage of by signing judgment.

Mr. *Mansel*, in support of his rule.—The language of the pleas sufficiently indicated that they were pleaded respectively to each count of the declaration: and, if informal, the plaintiff should have demurred specially, instead of signing judgment.

Lord Chief Justice TINDAL.—I think the plaintiff ought

[redacted]

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Monday, Nov. 24th.

The court refused to set aside for irregularity a judgment signed for want of a plea, where the declaration (against a prisoner) had been delivered without any notice to plead.

CLEMENTSON *v.* WILLIAMSON.

A rule nisi was on a former day obtained by Mr. *Mansel* on the part of the defendant, a prisoner, to set aside the writ of detainer and a judgment that had been signed for want of a plea, on the ground of a defect in the writ, which did not strictly pursue the form given by the 2 Will. 4, c. 39; and also on the ground that there had been no notice to plead.—The writ was lodged on the 10th October; a summons taken out to set it aside was heard on the 18th, when the judge refused to make an order; the declaration was delivered on the 6th; a plea served on the 29th; judgment signed on the 4th November; a rule to compute obtained on the 6th; and the motion to set aside the writ was made on the 8th. As to the former branch of the rule, therefore, the defendant was too late.

Mr. Serjeant *Wilde* now shewed cause against that part of the rule which was founded upon the want of a notice to plead; which he contended it was not now the practice to indorse on the declaration, and was quite unnecessary, the rule to plead giving the party all requisite information.

Mr. *Mansel,* in support of his rule.—The rule to plead is the order of the court, and is merely entered at the secondaries' office, and a demand of plea is not necessary in the case of a prisoner; therefore the notice to plead is the only intimation he has as to what is required of him.

THE COURT (after conferring with the Secondaries) said.—We are informed by the officers that a notice to plead is not usual; and *that declarations are in fact more frequently delivered without than with notices to plead.* Unless, therefore, we can clearly see that the plaintiff has been guilty of an irregularity, we ought not to interfere.

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CLEMENTSON v. WILLIAMSON.

The defendant had a rule to plead and a demand of plea. He had therefore ample information to guide his proceedings.

Rule discharged (*a*).

(*a*) *Notice to plead.*—The decision in the text applies only to the case of a prisoner, who is already in court: in all other cases, the defendant is entitled to a notice to plead, before the plaintiff can sign judgment; though such notice *need not be indorsed on the declaration*, or delivered at the same time with it—Heath v. Rose, 2 New Rep. 223—West v. Radford, 3 Burr. 1452—Anon. 2 Wils. 137.

Rule to plead.—"The rule to plead is the order of the court, and may be entered on a præcipe with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, at any time after the delivery or filing and notice of the declaration, in term time; or, if the declaration be delivered or [illegible] the plaintiff's attorney, and may be made at the time when the declaration is delivered, and may be indorsed thereon—Reg. Gen., Hilary Term, 2 Will. 4, 43. It seems that it cannot be until after the defendant has appeared, or the plaintiff has entered an appearance for him or filed common bail according to the statute—Martin v. Mahony, 5 Dowl. & Ryl. 609, Cook v. Raven, 1 Term Rep. 635, Palk v. Rendle, 8 Term Rep. 465, Free v. Mason, 5 Barn. & Cress. 763, North v. Lambert, 2 Bos. & Pull. 218. No demand of plea is necessary where the defendant is in custody of the sheriff, or of the warden, and the plaintiff has declared against him as being in such custody—Wilkinson v. [illegible]

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Tuesday, Nov. 25th.

An affidavit to hold to bail stated the defendant to be indebted to the plaintiff in 300*l.* for money paid, &c. to and for his use and at his request, and for interest due and owing from, and *agreed to be paid* by, the defendant to the plaintiff for and in respect thereof:—Held, sufficient.

HUTCHINSON v. HARGRAVE.

THE defendant was arrested upon an affidavit alleging him to be indebted to the plaintiff in the sum of 300*l.* for money paid, laid out, and expended by the plaintiff to and for the use of the defendant, and at his request, and for interest due and owing from, and *agreed* to be paid by, the defendant to the plaintiff for and in respect thereof.

Mr. *Addison*, on a former day, obtained a rule nisi that the bail-bond might be delivered up to be cancelled, on the ground that the above affidavit omitted to distinguish the several amounts due for principal and interest.—He cited *Latreille* v. *Hoepfner* (*a*), where it was held, that, in an affidavit to hold to bail for principal and interest due on a bill of exchange, it must be made to appear that the amount due for principal is large enough to warrant an arrest.

Mr. Serjeant *Coleridge* shewed cause.—It was quite unnecessary in the present instance to separate the principal from the interest, inasmuch as by the agreement of the parties interest was payable, and the defendant might consequently be held to bail for the interest as well as for the principal, which was not the case in *Latreille* v. *Hoepfner*, where it did not appear that the bill of exchange bore interest. The present case is therefore clearly not within the principle of that cited.

Mr. *Addison*, in support of his rule.—The affidavit ought to have disclosed the nature of the agreement to pay interest. A forbearance without request would not entitle the plaintiff to interest.

(*a*) 3 Moore & Scott, 800, 10 Bing. 334.

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HUTCHINSON v. HARGRAVE.

PER CURIAM.—We think the affidavit is sufficiently certain. The word "agreement" necessarily imports the consent of both parties.

Rule discharged—the costs to be costs in the cause (*b*).

(*b*) But see Brook v. Trist, 10 East, 358, where it was held that an affidavit stating that the defendant was indebted to the plaintiff in so much "for interest money, under and by virtue of an agreement," is *not* sufficient. "The debt may arise out of a special undertaking and *therefore* the affidavit is clearly bad in substance" —Per Curiam, Waters v. Joyce, 1 Dow. & Ryl. 150. So, a statement that the defendant is indebted, "as appears by agreement," is insufficient—Jennings v. Martin, 3 Burr. 1447.

But it seems, that, if in an affidavit of debt for principal and interest, a sum and a date are mentioned, from which interest can be computed, it is not essentially necessary that the amount claimed for interest should be specifically stated. Rogers v. Godbold, 3 Dowl. 106.

Tuesday, Nov. 25th.

Quære whether

BOSLER v. LEVI.

THE defendant was arrested on a writ of capias, in the

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ereon, nor the date of the writ indorsed, as (he con- was required by the 2 Will. 4, c. 39, sched. No. 4. eferred to *Roberts* v. *Wedderburne* (*a*), where a capias was set aside for the omission of the place nty of the defendant's residence.

Comyn shewed cause.—The form given in the e of the uniformity of process act has been strictly l. Although in the form of the writ of summons No. 1) the county is required to be stated, it is se with respect to the capias: and the reason evi- is that the latter can only be executed by the in his own county.—Neither is it necessary to state ndorsement the county in which the attorney who he writ resides. In *Engleheart* v. *Eyre* (*b*), *King khouse* (*c*), and *Jelks* v. *Fry* (*d*), "Gray's Inn, ı," was held to be a good description of the resi- f the attorney who issued the process, to satisfy ute, although Gray's Inn is in the county of Mid- —The act does not require the date to be stated in orsement of the writ—*Webb* v. *Lawrence* (*e*).—At its, the form of the motion is misconceived: the int should have applied to set aside the writ itself, t merely the copy. [The Court disposed of this ojection by observing that the defendant could have mation as to the contents of the capias except from y (*f*).]

Moore & Scott, 488, 1 C. 4.
Dowl. P. C. 145.
Dowl. P. C. 221.
Dowl. P. C. 37.
Cr. & Meeson, 806, 2 C. 81.
he copy of the writ served fendant is materially de- is a ground for discharg- ing the defendant on common bail, though the writ itself be right —Street v. Carter, 2 Dowl. P. C. 671. And see Nicoll v. Boyne, 3 Moore & Scott, 812—Hodgkinson v. Hodgkinson, 3 Nev. & Man. 564, 2 Dowl. P. C. 535—Smith v. Pennell, 2 Dowl. P. C. 654. But see Hasker v. Jarmaine, 3 Tyr. 381.

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Mr. Serjeant *Atcherley*, in support of his rule.—The 4th section of the uniformity of process act, and the sched. No. 4, annexed thereto, were properly construed in *Roberts* v. *Wedderburne*, by analogy to the 1st section and the sched. No. 1, as requiring the place and county of the defendant's residence to be inserted in the capias; and that decision must govern the present case.

Lord Chief Justice TINDAL.—The only objection upon which any doubt remains on the minds of the court is, that, in the copy of the writ of capias, the defendant is described as of "Leman Street, Goodman's Fields," without naming the county. But, upon reference to the distinction between the language of the 1st and 4th sections of the 2 Will. 4, c. 39, and also between the forms No. 1 and No. 4 in the schedule thereto annexed, I cannot help thinking that there is no necessity for inserting the county in the writ of capias. The 1st section of the statute, which gives the writ of summons, directs that "in every such writ, and copy thereof, the place *and county* of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be,

therefore the mention of the county in the writ would be superfluous. In *Roberts* v. *Wedderburne* this precise point was not before us, and therefore I do not feel myself bound to adhere to that decision in a case where our attention is directly called to the subject, and we can perceive this distinction. One circumstance that has operated with me is, that, in the indorsement required by the schedule of the name of the party by whom the writ of capias is issued, the mention of the county is not required.

Mr. Justice GASELEE.—In *Roberts* v. *Wedderburne* I differed from the rest of the court; founding my opinion upon the different natures of the writ of summons and the writ of capias—the summons being directed to the defendant, and therefore the county in which he resides necessarily stated in it: whereas the capias, being directed to the sheriff, can only be executed by the sheriff of the county in which the defendant resides.

Mr. Justice VAUGHAN.—I should have been better satisfied with a better description. There must at least be a virtual compliance with the act. In *Webb* v. *Lawrence* it was held to be unnecessary to state the number of the house or the parish where the defendant resided: but there the *county* was stated. I think here the description is hardly sufficient.

Mr. Justice BOSANQUET.—I am sorry that my impression differs from that of my Lord Chief Justice and my Brother Gaselee. The only question seems to me to be whether or not the 4th section of the act and No. 4 of the schedule are to be construed with reference to the 1st section and No. 1 of the schedule: that is, whether it is necessary in the writ of capias, the form of which is given in schedule No. 4, to state the county in which the defendant resides, as well as the street or place. By the

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1st section of the statute, the writ of summons is required to state the place and county of the residence of the defendant. In the 4th section nothing is said about the party's residence: but, looking at the form given in the schedule No. 4, it appears to me that the 4th section is to be construed with reference to and as incorporating the first section; and that the blank left in the form for the defendant's residence is to be filled up as in the writ of summons. The case of *Roberts* v. *Wedderburne* certainly is not identically the same as this; but still I think it is an authority in favour of this mode of construction. There, the defendant was detained upon a pluries writ of capias, wherein there was a blank left for his place of residence, after a capias and alias capias had been issued describing him as of Chesterfield Street, May Fair, in the county of Middlesex: and the court held the writ irregular, upon the ground that this was not a literal compliance with the form prescribed by the act.

The Court being equally divided, no rule was pronounced (*g*).

[redacted]

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Wednesday, Nov. 19th.

In an action of assumpsit for money had and received, to recover back a sum alleged to have been overpaid by a tenant to his landlord upon a settlement between them in relation to a distress for arrears of rent, it appeared that the plaintiff held the premises under a lease from Michaelmas 1832:—Held, that a memorandum written in the margin of the draft of the lease, whereby the tenant engaged to pay rent for the preceding half-quarter, was admissible in evidence for the purpose of negativing the plaintiff's claim.

Semble, that assumpsit was the proper form of action, and not case for an excessive distress.

COWNE *v.* GARMENT.

THIS was an action of assumpsit for money had and received, tried before the undersheriff of Middlesex. The action was brought by the plaintiff to recover a sum of 12*l.* 10*s.* alleged to have been overpaid by him to the defendant, his landlord, upon a settlement between them in relation to a distress for arrears of rent. At the trial the defendant offered in evidence the draft of a lease by which the premises had been demised by him to the plaintiff for twenty-one years from Michaelmas, 1832, at the rent of 100*l.* per annum, for the purpose of proving a memorandum written in the margin thereof, to the effect that the plaintiff was to pay rent from the 14th July, when his occupation commenced, to the 28th August, the date of the lease. This draft was signed at the bottom by the plaintiff. The undersheriff refused to receive this document in evidence. It was objected on the part of the defendant that the action should have been case for an excessive distress, and not assumpsit. A verdict having been found for the plaintiff for 12*l.* 10*s.*, subject to a motion for a nonsuit if the court should think the action misconceived or the memorandum improperly rejected—

Mr. *Petersdorff*, on a former day, obtained a rule nisi for a nonsuit or new trial, on the grounds above stated. He cited *Lindon* v. *Hooper* (*a*), where it was held that an action for money had and received will not lie to recover back money paid for the release of cattle damage feasant, though the distress was wrongful: and also the cases of *Kerr* v. *Osborne* (*b*) and *Marshall* v. *Hopkins* (*c*), to shew that parties cannot at pleasure change the ordinary forms of actions.

Mr. *Justice* now shewed cause.—The plaintiff does not complain of an irregular or excessive distress: he could

(*a*) Cowp. 414. (*b*) 9 East, 378. (*c*) 15 East, 309.

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neither have sued under the statute of Marlbridge, nor under the 11 Geo. 2, c. 19. *Lindon* v. *Hooper* therefore does not apply; for there the action was brought solely for the purpose of trying the validity of the distress. There are many cases where a party may waive the tort and sue in this form of action. In *Feltham* v. *Terry* (*d*) the court said: "It is manifest that the taking was tortious, and that the plaintiff might have brought an action of trespass. But we all think he may waive the tort and go for the money clearly due; and if he does, it is a benefit to the defendant, because he can then recover no more than in equity he is bound to receive." The memorandum in the margin of the draft was clearly not receivable in evidence for the purpose of controlling the lease afterwards entered into between the parties. The draft itself would not be evidence. At all events, the defendant is not entitled to a nonsuit.

Mr. Serjeant *Wilde* and Mr. *Petersdorff*, in support of the rule.—Upon the authority of the cases cited, the action is clearly misconceived. Besides, the defendant cannot recover back in an action of this sort money paid by

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COWNE v. GARMENT.

rent not included in the lease. The plaintiff does not complain of the absence of authority to distrain. But I am not prepared to say that a nonsuit ought to be entered. The rule must therefore be made absolute for a new trial.

The rest of the court concurring—

Rule absolute accordingly (*a*).

(*a*) On the second trial it appeared that the lease had been put an end to, and possession of the premises given up to the landlord upon certain terms, on the 27th of July, 1833; and that the half-quarter's rent had been the subject of discussion upon that occasion, and an account stated and balanced between the parties, containing that item; which the jury found to be a final settlement.

A verdict having on the second occasion been found for the defendant, a rule nisi for a new trial was obtained on the part of the plaintiff, which, in Michaelmas term, 1835, was discharged.

USBORNE and Another *v.* PENNELL.

Wednesday, Nov. 19th.

In an action on a bill of exchange, the declaration was delivered and a rule to plead served in Easter Term. On the 12th May, the defendant paid part of the demand with costs, and engaged to pay the remainder on the 1st October. The defendant failing to pay the balance pursuant to the agreement, the plaintiffs, *without giving a new rule to plead*, signed judgment in Michaelmas Term: —Held, regular.

THIS was an action by the indorsees against the indorser of a bill of exchange for 600*l.* The declaration was served and a rule to plead given in Easter Term last. On the 12th May, the defendant obtained a summons for time to plead, and afterwards entered into an agreement with the plaintiffs to pay them 200*l.* immediately, with costs up to that time, and the residue of the bill and interest on the 1st October, unless it were in the interim paid by the drawer. The 200*l.* was accordingly paid, together with the costs, including a charge for "attending the defendant on the *settlement of the suit*:" and the balance being unsatisfied, the plaintiffs, without giving a new rule to plead, signed judgment in the present term.

Mr. Serjeant *Talfourd*, on a former day, obtained a rule nisi to set aside the judgment for irregularity.—He submitted that the action was at an end by the agreement

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entered into on the 12th May; and that, at all events, a new rule to plead ought to have been given of the term in which the judgment was signed.

Mr. Serjeant *Wilde* shewed cause.—The suit was merely suspended conditionally: on the defendant's failure to perform the condition, the plaintiffs were remitted to their former rights; as in *Puckford* v. *Maxwell* (*a*), *Penfold* v. *Maxwell* (*b*), and *Cantellow* v. *Trueman* (*c*): and consequently no new rule to plead was necessary. In *Mould* v. *Murphy* (*d*), where the declaration and rule to plead were both in vacation, a judgment signed in the next term without a new rule to plead was held regular. And in *Pryer* v. *Smith* (*e*), it was held, that, where the declaration is delivered in the term, judgment may be signed in the following term, for want of a plea, without giving a rule to plead of the term in which the judgment is signed.

Mr. Serjeant *Talfourd* was heard in support of the rule.

Lord Chief Justice TINDAL.—After the agreement of the 12th of May, which in effect amounts to a confession of the action, there can be no defence. Upon the defen-

been guilty of an irregularity in signing judgment without giving a new rule to plead. The case of *Pryer* v. *Smith* is an authority upon this point: no new rule to plead was necessary.

The rest of the court concurring—

Rule discharged.

THOMPSON *v.* BRADBURY and Another, Assignees of VENABLES, a Bankrupt.

Saturday, Nov. 22nd.

In covenant on an indenture of lease by the lessor against the assignees of the assignee of the term, who had become bankrupt, the court allowed the defendants to plead—that the estate and interest of the lessee did not vest in them—and that they, being appointed assignees of the bankrupt, abandoned, declined, and refused to accept the term.

THIS was an action of covenant upon an indenture of lease, by the lessor against the assignees of the assignee of the lessee, who had become bankrupt, for non-payment of rent, and for non-repair of the demised premises.

Mr. *Hoggins*, on the part of the defendant, obtained a rule to plead several matters—amongst others, 1. that the estate and interest of the lessee in the premises did not vest in the defendants—3. that the term of years granted to the lessee came to and vested in Venables, who was afterwards duly declared a bankrupt; that J. S. (one of the defendants) was duly appointed official assignee of the estate and effects of Venables, and the other defendants were appointed assignees with the said official assignee, who afterwards abandoned, declined, and refused to accept the said term of years; and that therefore the defendants never became assignees thereof, and the same term never vested in the defendants, so as to render them chargeable with the performance of the covenants in the declaration mentioned.

Mr. *Amos* shewed cause.—He submitted that all that could be proved under the third plea might equally be given in evidence under the first, and therefore both ought

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not to be allowed: and he cited *Copeland* v. *Stephens* (a), where it was held that the general assignment of a bankrupt's personal estate does not vest a term of years in the assignees unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate.

Mr. *Hoggins*, in support of his rule.—The case of *Copeland* v. *Stephens* was decided prior to the passing of the 1 & 2 Will. 4, c. 56, which has made a material alteration in the law upon this point. The 25th section of that statute provides "that, where any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, *shall become absolutely vested in and transferred to the assignees* or assignee for the time being, *by virtue of their appointment, without any deed of assignment for that purpose*, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them." It would appear, therefore, that acceptance is not now necessary to the vesting of the property in the assignees; consequently the

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ı did not vest in the defendants, being expunged, that ıg already denied by the first plea.

Rule absolute accordingly.

ALEXANDER and Another v. GARDNER and Another.

Monday, Nov. 24th.

Under non assumpsit to a count for goods bargained and sold, evidence may be given that the contract was made subject to conditions which have not been complied with on the part of the vendor.

R. *F. Kelly* moved for leave to plead to a declaration ssumpsit for goods bargained and sold—non assump- and that the goods were sold under a special contract, ongst other things) to be shipped free on board within current month, to be landed in London within a given :, and to be paid for by bill at two months from the of landing.

'ER CURIAM.—Non assumpsit alone will suffice: the ndant may under that plea shew that the contract was le subject to conditions which have not been complied ı on the part of the vendors.

Rule refused.

DUDDEN v. LONG.

Tuesday, Nov. 25th,

To entitle a sheriff to a rule under the interpleader act, it must be made clearly to appear that he has not in any manner colluded with either of the parties.

HE defendant's goods having been seized and sold un- a writ of fi. fa. at the suit of the plaintiff, and the riff of Wiltshire ruled to return the writ, and the ds being claimed by the assignees of the defendant, ı had become bankrupt, the sheriff obtained a rule er the interpleader act.

Ir. Serjeant *Ludlow*, on the part of the execution cre- r, shewed cause, upon an affidavit which disclosed the

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DUDDEN v. LONG.

following facts:—The fi. fa. in question had been lodged at the office of the undersheriff for the county of Wilts on the 30th September, 1834, when a gentleman who in partnership with the undersheriff carried on the business of a solicitor, informed the plaintiff's attorney that his writ would have priority, as another fi. fa. issued against the defendant at the suit of one W.D.W. had been returned for irregularity. The plaintiff's attorney then gave orders for a bill of sale, and was desired to call for it the next day at two o'clock. He called accordingly, but, finding no person at the undersheriff's office, called again at seven in the evening, when the partner demanded an indemnity, stating that the defendant's goods had that day been seized under the fi. fa. at the suit of W. D.W. The indemnity being refused, the undersheriff's partner observed that he was not bound to sell without a venditioni exponas; and, after some further conversation, he added, that, if the plaintiff would wait a week, he would then let him know whether or not the sheriff would sell. On the 4th October, the undersheriff wrote to the plaintiff's attorney, informing him that the defendant had committed an act of bankruptcy, and that a fiat was about to be issued against him. The fiat did issue on the 6th. The partner of the

terpleader act, see clearly that he stands free from suspicion of collusion with either claimant. I do not think that appears in the present case with sufficient certainty. It seems to me that there has been such an intermingling of the characters of attorney and of undersheriff that we should hardly be justified in suspending the plaintiff's proceeding.

The rest of the court concurring—

Rule discharged, with costs.

Mr. Serjeant *Coleridge* afterwards obtained four days' time for the sheriff to make his return to the fi. fa.

QUELLE, Administrator, &c., *v.* BOUCHER.

Tuesday, Nov. 25th.

Affidavits sworn in support of or in answer to one rule, will not be allowed to be used on another (though substantially embracing one of the objects of the former rule), where any doubt exists as to the practicability of assigning perjury thereon in reference to the rule upon which it is sought to use them.

THIS was an action brought by the plaintiff as administrator of one Goodman, deceased, to recover the amount of a bill of exchange for 20*l.*, indorsed by the defendant, which bill had been found by the plaintiff in the pocket of the intestate after his decease. The action was commenced before the statute 3 & 4 Will. 4, c. 42, came into operation; but the verdict was after. The declaration alleged promises both to Goodman in his lifetime, and to the plaintiff, as administrator, since Goodman's death. The defence (of which the plaintiff had had notice before he brought the action) was, that the bill in question had been indorsed by the defendant to Goodman to enable the latter to procure it to be discounted for the defendant. A verdict was found for the defendant, and a rule obtained on the part of the plaintiff that judgment might be entered up for the defendant without costs; or, if the defendant would not consent thereto, that a new trial might be had.

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Upon that rule coming on for argument, the court discharged it as to the former branch, and the latter (for a new trial generally) was not supported. A rule was afterwards obtained by the plaintiff calling on the defendant to shew cause why he should not be at liberty to discontinue without payment of costs, under the 31st section of the statute above referred to; which enacts—"That, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

Mr. Serjeant *Andrews* appeared to shew cause against this rule, upon the same affidavits that had been sworn (but not used) on the part of the defendant on the first

Mr. Serjeant *Andrews*.—The affidavits were made in reference to that part of the former rule which prayed that the judgment might be entered up without costs. The rule now before the court is in substance the same as that.

Lord Chief Justice TINDAL.—It certainly ought not to be left in doubt whether perjury could or could not be assigned upon affidavits that are used in the course of a cause. Looking to the first rule in the present case, it seems to have embraced two distinct matters—the one, the entering of judgment for the defendant without costs—the other, in the event of the defendant not consenting to that course, that a new trial should be had. When the rule came on for argument, the defendant declined the first alternative, and the last was not pressed; consequently the court lost all jurisdiction and power of inquiry as to the preliminary matter. I therefore entertain considerable doubt as to whether the affidavits made by the defendant in reference to that preliminary inquiry contain statements so material to the existing rule (the precise point in which was not before the court when they were sworn) that perjury could be assigned thereon. The safer course will be to have them re-sworn.

The rest of the court concurred. The merits of the rule were subsequently referred—

To the Prothonotary.

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Tuesday, Nov. 25th.

The lien of an attorney upon the damages and costs in a cause, is confined (where there are conflicting claims between the parties) to his costs incurred in the prosecution of the particular cause.

WATSON *v.* MASKELL.

AT the Spring Assizes for Essex in the year 1834, an action in which Maskell was plaintiff and Watson defendant, was tried, and a verdict was found for the plaintiff for 536*l.* At the same Assizes another action in which Watson was plaintiff and Maskell defendant was also tried, and a verdict in this latter action was by consent taken for the plaintiff for 200*l.* and costs. In Easter Term following, a rule was obtained by Watson for a new trial in the cause of Watson v. Maskell. On the 18th April, 1834, the defendant Maskell died. On the 22nd, judgment was signed against him in Watson v. Maskell, and a fi. fa. issued, tested on the 15th April, the first day of Easter Term; and under this writ the sheriff seized the goods of the deceased for a sum of 339*l.*, being the debt and taxed costs in the action. The representatives of Maskell thereupon obtained a rule nisi to set aside this fi. fa. for irregularity. The time for shewing cause against this rule was afterwards, by rule of the 3rd May, enlarged, the attorney for the executors paying into court the amount

n were still due and owing to him; and that he had
ıs the attorney and solicitor of Watson in other suits
ıtters in respect whereof Watson was indebted to
ponent in a larger sum than 339*l.*, the amount of
dgment obtained by Watson against Maskell.
ıt this last mentioned rule—

Serjeant *Goulburn* and Mr. *Hayes* now shewed
—The money in question having been paid into
xpressly to abide the event of the reference, the
f's attorney cannot be permitted to alter the condi-
f the parties by withdrawing that fund. At all
supposing the plaintiff's attorney to have any lien
pon the sum recovered by the verdict in Watson v.
ll, he can only be entitled to claim to the extent of
ts in that particular cause. This was expressly de-
ed in the case of *Stephens* v. *Weston* (*b*), where the
ant applied to set off the costs and damages reco-
n an action brought by him, against the costs and
es recovered in an action brought against him; and
ırt of King's Bench held that the plaintiff's attor-
d a lien upon the judgment obtained by his client
the defendant for the amount of his costs in that
only. Lord Chief Justice Abbott there said (*c*):
shall, as it seems to me, answer all the ends of jus-
laying it down as a general rule, that, where a party
to set off judgments in cross actions, the attorney
ıve a lien for the costs in the particular cause only:
m of opinion that that is the only lien to which an
y, is by law entitled." And Mr. Justice Holroyd—
re an attorney has incurred expenses in obtaining
nent, it is no more than just that his claim should
fied out of those funds which he has been instru-
in procuring for his client. More than this justice

wl. & Ryl. 399, 3 Barn. & Cress. 535. (c) 5 Dowl. & Ryl. 402.

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WATSON v. MASKELL.

does not require, and there is neither authority nor principle for holding that an attorney has a general lien for costs against the defendant in such a case as this."

Mr. Serjeant *Wilde*, in support of the rule.—*Stephens* v. *Weston* does not apply; for, here, the debts are not of equal degree; the plaintiff has obtained a judgment in this cause, but there is no judgment in Maskell v. Watson: and there is a distinction between a lien for costs as between party and party, and between attorney and client. Formerly it was held in this court that the lien of the attorney was subject to the equitable claims that existed between the parties to the cause: but since the 93 rule of Hilary Term, 2 Will. 4 (*d*), the practice has in this respect been assimilated to that of the court of King's Bench, and the attorney's lien is no longer to be prejudiced by any claim as between the parties to set off the damages and costs of one action against those of another: and that rule restrains the attorney's lien to the extent only of the costs in the particular suit, where such lien would interfere with the equitable rights of the parties.

arbitration; whereupon, in pursuance of an agreement between the parties, a sum of 339*l.* was paid into court to abide the future order of the court. Before we let it out we ought to see clearly that no prejudice will thence ensue to either party. At present we only say that we see no reason for permitting more than 139*l.*, the plaintiff's costs in this action, to be withdrawn.

The rest of the court concurring—

Rule absolute accordingly (*e*).

(*e*) See a report of a further motion in this case, post, Easter Term, when the court held that the attorney's lien upon the judgment was not confined to the *taxed costs*, but extended to the costs as between attorney and client.

Regula Generalis.

Entry of admission of attornies.

WHEREAS inconvenience hath arisen by reason of the attornies practising in this court not having made any entry of their admission as attornies, and of the taking out of their annual certificates, in the book kept for that purpose by the clerk of the warrants (*a*):

Termage fees payable by attornies to the clerk of the warrants.

AND WHEREAS, by the custom and rules of this court, every attorney ought to pay to the clerk of the warrants or his deputy, his termage fees, being eight-pence in every term, one moiety of which forms the fund for the support of the criers of this court:

(*a*) The inconvenience here alluded to was, that it had been held that parties who had neglected to cause their admissions to be inrolled could not sue for any fees or disbursements. See Humphrys v. Harvey, 4 Moore & Scott, 500.

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And whereas complaint has been made to us that of late such payments have been much neglected:

It is ordered, That every person admitted an attorney of this court, not having already entered such his admission, and also every attorney hereafter to be admitted, shall forthwith enter his admission, and shall cause his annual certificate to be, on or before the first day of Easter Term in every year, entered with the said clerk of the warrants; which entries shall in all cases where the annual certificate has been already entered in one of the courts, be made without fee or reward; and shall at the same time pay and discharge all his arrears of termage fees.

Arrears.

N. C. Tindal.
S. Gaselee.
J. Vaughan.
J. B. Bosanquet.

END OF MICHAELMAS TERM.

swell Cresswell, Esq., were respectively appointed his sty's counsel: and Matthew Davenport Hill, Esq., ved a patent of precedence to rank after Frederick iger, Esq. They were called to their seats accord- in the several courts on the first day of Michaelmas 1.

MICHAELMAS VACATION, 5 WILL. IV.

enry, Lord Brougham and Vaux, resigned the office ord High Chancellor of Great Britain. He was suc- ed by John Singleton, Lord Lyndhurst.

James Scarlet, Knight, was appointed to the office ord Chief Baron of the Exchequer, vacant by the tion of Lord Lyndhurst. On being called to the ee of the coif, Sir James gave rings with the following —" Ingenuas per Artes." He was shortly after- s raised to the peerage by the style and title of n Abinger, of Abinger, in the county of Surrey, and e city of Norwich.

rd Plunket resigned the office of Lord High Chan- of Ireland. Sir Edward Burtenshaw Sugden suc- ed him.

John Campbell, Knight, and Robert Mounsey Rolfe, his Majesty's Attorney and Solicitor-General, re- d their respective offices; in which they were suc- d by Frederick Pollock and William Webb Follett, ., who were thereupon knighted. The latter was also nted one of his Majesty's counsel learned in the law. e following gentlemen were also appointed his Ma- s counsel, and took their seats accordingly in the ctive courts on the first day of Hilary Term:—

illiam Burge, Esq., of the Inner Temple, Daniel efield, Esq., Henry John Shepherd, Esq., Christo- Temple, Esq., Walter Skirrow, Esq., and John

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Miller, Esq., of Lincoln's Inn, Charles Henry Barber, Esq., of Gray's Inn, George Spence, Esq., andThomas Joshua Platt, Esq., of the Inner Temple, Fitzroy Kelly, Esq., Richard Torin Kindersley, Esq., Edward Jacob, Esq., and James Wigram, Esq., of Lincoln's Inn.

The Judges who sat in the court of Common Pleas during the foregoing Term, were—

Lord Chief Justice TINDAL, Mr. Justice GASELEE, Mr. Justice VAUGHAN, and Mr. Justice BOSANQUET.

In the Common Pleas.

HILARY TERM, 5 WILL. IV.

1835.

The Hon. EDWARD MOSTYN LLOYD MOSTYN and THOMAS EDWARD MOSTYN LLOYD MOSTYN, an Infant, by the said EDWARD MOSTYN LLOYD MOSTYN, his Father and next Friend, v. Sir THOMAS S. MOSTYN CHAMPNEYS, Bart., Dame CHARLOTTE M. MOSTYN CHAMPNEYS, his Wife, and Others.

J. S., being tenant in tail in possession of estates in C., with remainder to his son in tail, &c., and reversion to himself in fee, and being also seised in fee of lands in W., without having suffered any recovery of the lands in C., devised "*all his real estates, whatsoever and wheresoever, over which he had any disposing power,*" to H. S. and his heirs, in trust for the testator's son for life, with several remainders in tail, and created various terms for the payment of such debts and annuities as the personalty should be insufficient to discharge, and also of marriage portions to the testator's daughters:—Held, that the reversion in fee of the lands in C. passed by the will—the words of the devise being sufficient to include such reversion, and no intention to exclude it being expressed in or necessarily to be implied from any other part of the will.

THE following case was sent by his honour, the Vice-Chancellor, for the opinion of this court:—

Sir Thomas Mostyn, Bart., was, at the respective times of making his will and of his death, seised in fee simple of and absolutely entitled in possession to the manors or lordships of Beeston, Peckforton, Spurstow, Great Neston, Thornton, Hough, alias Mayo, Leighton, and Bunbury, and other messuages, lands, rectories, tithes, and hereditaments, situate respectively in the county of Chester and in the county of the city of Chester, and also of large estates in the counties of Flint, Denbigh, Carnarvon, and Anglesea; and, being so seised and entitled, by his last will and testament in writing, duly executed and attested,

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MOSTYN v. CHAMPNEYS.

Will of Thomas Mostyn, devising to his son Roger, as tenant in tail.

dated the 9th May, 1752, gave and devised his Welsh estates as follows viz.: "To my son Roger, and the heirs male of his body lawfully issuing, and, for default of such issue, unto my son Thomas, and the heirs male of his body lawfully issuing; and, for default of such issue, to all and every other the son and sons of my body lawfully begotten, and the heirs male of the body and bodies of all and every such son and sons lawfully issuing, in tail male, severally and successively, one after another, according to the seniority of age and priority of birth of each of them; and, for default of such issue, to my brother John and the heirs male of his body lawfully issuing; and, for default of such issue, to my brother Savage and the heirs male of his body lawfully issuing; and, for default of such issue, unto my brother Roger and the heirs male of his body lawfully issuing: and, for default of such issue, to my own right heirs." And the said testator thereby gave and devised his several manors, lands, tenements, and hereditaments in the county of Chester and in the county of the city of Chester, unto the person or persons who should be entitled to the inheritance of his lands in Wales after his decease, by virtue of the limitations thereof aforesaid in his said will contained.

Death of Tho-

The said Sir Thomas Mostyn died in the year 1758.

[redacted]

s aforesaid, was seised of and well entitled in possession) divers other estates and hereditaments in the said unties of Denbigh, Flint, and Carnarvon, part whereof re settled by him in or about the year 1766 on the oc- sion of his marriage, but he never suffered any recovery made any other assurance for barring the said estate tail male or the said remainders over in the said estates the said county of Chester and county of the city of ester, but continued in possession or in receipt of the its and profits thereof as tenant in tail male up to the e of his decease hereinafter mentioned. He also in his e time and after his marriage in the year 1766 pur- ased divers other real estates in the said county of Flint, d continued to be and was at the respective times of king his will and of his death hereinafter mentioned, sed in fee simple of, or otherwise well entitled to, the d real estates so purchased by him. The said Sir ger Mostyn duly made and published his last will and stament in writing bearing date the 11th April, 1793, ly executed and attested, and thereby gave and be- eathed to each of his unmarried daughters who should tain the age of twenty-one years and be unmarried at e time of his death, from the time of his death until their spective marriages, and to such of them as should not en have attained twenty-one, from the time they respec- vely attained that age until they should be respectively arried, such an annuity as, with the interest of their are of 20,000*l.* provided for their portions by his mar- age settlement, would, at 4*l.* per cent., make to each of em 500*l.* a year; and upon their respective marriages he irected their annuities to cease, and in lieu thereof that ch daughter marrying should be entitled to such sum with her share of the said 20,000*l.* would make up the m of 10,000*l.* And the testator by his will gave and evised in the words following: "And I do hereby give nd devise all my real estates whatsoever and wheresoever,

Will of Sir Roger Mostyn.

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over which I have any disposing power, unto Hugh Scott, of Merton, in Berwickshire, Esq., his heirs and assigns, to the uses, upon the trusts, and for the intents and purposes hereinafter expressed and declared of and concerning the same, that is to say, to the use of my kinsman John, Duke of Roxburgh, my brother, the Rev. Thomas Mostyn, my son in law, Thomas Champneys, Esq., and E. Woodcock, of Lincoln's Inn, in the county of Middlesex, Esq., their executors, administrators, and assigns, for the term of five hundred years, to commence and be computed from the day of my death—upon trust by and out of the rents and profits of the said estates, or by sale or mortgage of the same estates, or of a competent part thereof, for all or any part of the same term, to raise and pay so much and such part of my said debts, funeral expenses, and legacies, and annuities, as my personal estate not hereinafter specifically bequeathed shall be deficient to raise and pay the same." And the testator by his will further directed, that, subject to the said term, and the trusts thereof, the said Hugh Scott, his heirs and assigns, should stand seised of his said estates to the use of his son, Thomas Mostyn, and his assigns, for life, without impeachment

der to the use of the said Hugh Scott and his heirs during the life of his said daughter, in trust to preserve contingent remainders; with remainder to the use of the first and other sons of his said daughter Essex Mostyn successively in tail male; with remainder to the use of his daughter Charlotte Champneys (the defendant, dame Charlotte Mostyn Champneys) and her assigns, during her life, without impeachment of waste; with remainder to the use of the said Hugh Scott and his heirs during the life of the said Charlotte Champneys, in trust to preserve contingent remainders; with remainder to the first and other sons of the said Charlotte Champneys successively in tail male; with remainder to the use of his the said testator's daughter Elizabeth (now the Right Hon. Elizabeth, Baroness Mostyn, and the mother of the plaintiff Edward Mostyn Lloyd Mostyn) and her assigns, during her life, without impeachment of waste; with remainder to the use of the said Hugh Scott and his heirs during the life of the said Elizabeth, Lady Mostyn, upon trust to preserve contingent remainders; with remainder to the use of the first and other sons of the said Elizabeth Mostyn in tail male; with divers remainders over, and with the ultimate remainder to his the testator's own right heirs. And the testator by his said will declared that the said term of one thousand years was limited to the trustees thereof, upon trust, that, when and as his said estates should come into the possession of any of his daughters or her issue male, the said trustees should, by sale or mortgage of a competent part of the estates comprised in the said term, levy, raise, and pay to each other of his said daughters who should happen to be then living the sum of 10,000*l.*, and, in case any of his said other daughters should happen to be then dead leaving any child or children, the like sum of 10,000*l.* to the child or children of each of his said other daughters who should happen to be then dead. The testator, Sir Roger Mostyn, died in the year 1796, without having

Death of Sir Roger Mostyn, leaving Thomas

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MOSTYN v. CHAMPNEYS.

Mostyn his son and heir at law.

altered or revoked his said will, leaving Thomas Mostyn, in his said will named, his only son and heir at law, him surviving; who thereupon became Sir Thomas Mostyn, Bart.; and he the said Sir Thomas Mostyn the younger, upon the death of the testator, Sir Roger Mostyn, his father, became and was seised of and entitled to the said manors, estates, hereditaments, and premises in the said county of Chester and county of the city of Chester, as tenant in tail male thereof in possession, under and by virtue of the said devise thereof in the will of his grandfather, the said Sir Thomas Mostyn the elder, and subject to the remainders over in tail thereby limited. The said Sir Roger Mostyn was at the date of his will and at the time of his death in the receipt of the rents and profits of the estates in the county of Chester and county of the city of Chester in question in this cause, amounting annually to the sum of 5,000*l.*, or thereabouts, and was also in possession and in receipt of the rents and profits of the estates in the counties of Flint and Carnarvon over which he had a disposing power, amounting to the annual sum of 2,750*l.*, or thereabouts. At the time of the death of Sir Roger Mostyn, in the year 1796, the several persons to

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said city of Chester under the will of the said testator Sir Thomas Mostyn the elder, was his son, the Rev. Thomas Mostyn, clerk. The said Rev. Thomas Mostyn died in the year 1805, without ever having had any children. Sir Thomas Mostyn the younger died in the the year 1831, without having had issue, or having suffered any common recovery, or made or effected any assurance by which his estate in tail male, or the remainders limited by the will of the testator, Sir Thomas Mostyn the elder, in the said manors, estates, hereditaments, and premises in the said county of Chester, and county of the city of Chester, were in any manner barred or destroyed. The plaintiffs alleged that the reversion in fee in the estates in the county of Chester and county of the city of Chester, upon the death of the said Sir Roger Mostyn, vested in the said Sir Thomas Mostyn the younger, who was from that time and up to the time of his death hereinbefore mentioned, under the will of the said Sir Thomas Mostyn the elder, seised in tail male in possession, with (as the plaintiffs alleged) the immediate reversion in fee simple in himself. The said Essex Mostyn, one of the devisees named in the will of the said Sir Roger Mostyn, died on the 20th May, 1829, without issue. Upon the death of the said Sir Thomas Mostyn the younger without issue as aforesaid (the said Essex Mostyn having died in his lifetime), the defendant dame Charlotte M. Mostyn Champneys became and is now seised or entitled under the limitations contained in the said will of Sir Roger Mostyn of or to the estates and hereditaments thereby devised as aforesaid, as tenant for life thereof; and she claims to be entitled, as such devisee, not only to the estates of which the testator Sir Roger Mostyn was seised in fee simple in possession at the time of making his will, but also to the said manors, estates, hereditaments, and premises in the county of Chester and county of the city of Chester, of which the said testator was tenant in tail, with such remainders over as aforesaid,

Death of Sir Thomas Mostyn the younger, without issue.

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with the reversion to himself in fee; she the said Lady Mostyn Champneys asserting that the said reversion in fee passed by the will of the said Sir Roger Mostyn, and was subject to the limitations thereby made.

The question for the opinion of the court was—Whether the reversion in fee of the manors, estates, hereditaments, and premises in the county of Chester and county of the city of Chester passed by the will of the said Sir Roger Mostyn, or descended upon his death on his son the said Sir Thomas Mostyn the younger.

Mr. *Hodgson*, for the plaintiff.—The reversion in fee in the estates in question descended to the eldest son of Sir Roger Mostyn, and did not pass by the will. The testator begins with devising "all his real estates over which he had any disposing power," meaning a power of disposing of *by will*. At this time, being tenant in tail in possession, had he suffered a recovery as to the Chester estates (as, it may be collected from the case, he had done with regard to the Welsh estates), he might have made himself master of the fee, and thus acquired the right of disposing of them by will. He must, therefore, have known that he did not possess this dis-

by the will.—The general rule of law, that every species of limitation which a testator has may pass provided he uses sufficient and apt words, is not denied. But general words in a will do not pass a reversionary interest where the other dispositions contained in the will are evidently incompatible with an intention that such interest should pass. In *Goodtitle* d. *Daniel* v. *Miles*, 6 East, 494, A. being possessed of lands at L. which had been settled on his marriage on himself for life, remainder to his wife for life for her jointure, remainder to the heirs of their bodies, with reversion in fee to himself, and having other lands at P. and Q. settled to the same uses (except a coppice, part of Q., of which coppice as well as of some other lands he was seised in fee), after the death of his wife, and having only two daughters living, devised to his daughter J. *in tail* his unsettled estates by name, *and all other* his freehold, copyhold, and leasehold lands which he was possessed of or entitled to, *and which were not settled in jointure on his late wife* (except the coppice, which he directed should always be held with his estate at P.), she his said daughter and the heirs of her body *paying out of all the aforesaid lands* a certain annuity unto his other daughter A. M. for life; and, in case his said daughter J. should die and leave no issue, then to his other daughter A. M. *for life*, remainder to her children, charged &c., *remainder to his nephew in fee:* it was held that the remainder of the settled lands did not pass by the will, but was excepted out of the general clause by force of the restrictive words "and which are not settled in jointure," &c., not only by the natural import of those words, but because of the incongruity of imputing to the devisor an intention of devising estates *tail* and *for life* to his daughters in lands which were before settled on them in tail general: though it did not appear that the testator had any other real estate on which the general clause could operate, except the reversion of his settled lands. Lord Ellen-

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borough, in delivering the judgment of the court, there says: " At the time of making the will the wife was dead, and the testator had only two daughters living, who, under the settlement, had in these lands a vested remainder in tail general, expectant on the determination of a life estate in the devisor. Under these circumstances, the devisor had no interest which could be the object of any disposition to be made by him, but subject to the remainder in tail general in his daughters; nor had he anything upon which his will could operate in the limitation of any estate in possession until both daughters should be dead without issue: and therefore, if the testator's object was, as according to the provisions of the will it must have been, *to limit estates which were to take effect during his daughters' lives*, it is impossible to suppose the testator could mean that his will should extend to lands in respect of which he must have known that it could not operate to create the estates intended.—If anything could properly be inferred from the wording of the clause as to whether he had any other estates or not, one would be led to suppose that he had both copyholds and leaseholds not specifically devised: if he had neither, it shews that the clause was meant cautiously to take in things to which the devise

plaintiff, it is not necessary to go into them; for, the general doctrine contained in them is not disputed, and our opinion goes on this, that, supposing the words '*not settled in jointure on my wife*' to be insufficient of themselves to restrain the effect of the general words in the clause relied on by the plaintiff, yet, taking with them at the same time into our consideration the limitations in the settlement and in the will, they must we think be understood as being restrictive: and the question in this case is, as in most other cases on wills, a question of intention to be collected from the whole of the instrument as applied to the subject-matter.—And, as to the case of *Glover* v. *Spendlove*, 4 Bro. Ch. Cas. 337, although in that case the words were the same as in this, yet it is to be observed that there, as the testator had no son, he had for all purposes of substantial benefit the fee expectant on his wife's life estate, she being then alive." In *Welby* v. *Welby*, 2 Ves. & Bea. 187, the Master of the Rolls says: "Where the words are general, 'all my estates,' and the limitations are not adapted to an estate in reversion, the argument is, such estate was not meant to be included under the general term. Where a particular estate is expressly given, we cannot say it is not included: but, if the testator has only a reversionary interest in it, and the limitations are not adapted to such an interest, the argument is, the testator must have conceived himself to have, or must have assumed the power of giving, such an estate as admitted of being so limited. The question either way is, whether it was not of estates in possession that the testator meant to dispose; if it was, then the effect in the one case is, that, to an estate in reversion the devise is not to be extended; in the other, that, to an estate in reversion it is not to be confined. With all the anxiety which the will manifests to keep the estate in the family as long as possible, by making his son and grandson tenants for life, it is inconceivable that he should not have acquired to himself

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the power of making those limitations effectual if he knew that as things stood they would be wholly inoperative." Here, the testator very carefully confines the devise to that over which he had a disposing power: and, being tenant in tail in possession, he had it in his power, if he thought fit, to prevent any inconsistency, by suffering a recovery.

Mr. *Preston*, contra.—The reversion in fee of the estates in Chester did pass by the will of Sir Roger Mostyn. The testator clearly had them in his contemplation at the time he made this devise. The general rule is that the words of a will shall receive the largest construction: and, to exclude their operation, a clear intent to that effect must be apparent on the face of the instrument. Here, the words the testator has used are sufficient to pass all he possessed both present and future. The fallacy of the argument on the other side is, that it assumes that Sir Roger was aware that he had only a remote reversion in this property. The provisions of the will would be totally inadequate unless the testator contemplated that the whole of his property passed by the will. It is stated in the case

"all the residue and remainder of her estate and effects" to be sold as soon as might be after her death, and her funeral expenses to be paid thereout, and the overplus (if any) to be divided between D. and E.: it was held that the reversion did not pass by these general words. But that case was, together with that of *Welby* v. *Welby*, overruled by Lord Eldon, on an appeal from a decision of the Master of the Rolls in *Church* v. *Munday*, 15 Vesey, 406. "I am strongly influenced (says his lordship) towards the opinion that a court of justice is not by conjecture to take out of the effect of general words property which these words are always considered as comprehending. The cases upon the effect of general words as applying to rents and profits not disposed of, as in *Hopkins* v. *Hopkins*, For. 44, Atk. 581, 1 Vezey, 268, or to a reversion altogether unlikely to fall into possession, have gone upon this—that it is much more safe to consider those subjects intended which the words describe, than to supply a purpose by conjecture; determining for the testator upon the more or less convenience with which that subject may be, which he has declared shall be, applied. The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary; and surely that is the safest course, where, as there is no other subject to which they can be applied, the testator must, if he does not mean that, be considered as having no meaning." *Strong* v. *Teatt* is, however, the leading case upon the subject. There, A. Mervin, on the marriage of his eldest son, Henry, settled the manor of Arlestown on himself for life, remainder to his son Henry for life, remainder to the first and other sons of Henry in tail, &c., with the reversion in fee to the father. A. Mervin had issue three other sons, Audley, James, and Theophilus, and four daughters; and, being seised of other lands in fee simple, he made his will, by which he devised all those lands

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whereof he was seised in fee simple in possession to his wife; and also all other the lands, tenements, and hereditaments whereof he was seised in fee simple, or whereof any other person was seised in trust for him; with a proviso that if his sons Henry and Audley (his first and second sons) should both of them die without issue male, in the lifetime of his son James (his third son), whereby the estate settled on his son Henry on his marriage should descend on his son James, that then his son James should not take any interest or estate in the lands thereinbefore devised to him. The question was, whether the reversion in fee of the lands which were settled on Henry should pass by this devise. The court of King's Bench in Ireland held that the reversion in fee did pass: but this judgment was reversed by the court of King's Bench in England (*a*). Lord Mansfield, in delivering the judgment of the court, observed: "The generality of the expression, 'and also all other the lands, tenements, and hereditaments in the said counties of Tyrone and Meath, or either of them, whereof I am seised in fee simple, or of which any other person is seised in trust for me, together with all and every of their appurtenances,' if unrestrained and unqualified by other

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words which expressly and clearly shew that the testator had no intention to include the reversion of the settled estate in his will, as much as if he had used particular words and expressions to declare it directly and explicitly. In the case of *Coryton* v. *Hellier*, the testator omitted to add the words 'if he shall so long live,' to the estate which he gave to his son for ninety-nine years; and yet Lord Hardwicke construed it that it must mean, not an absolute term of ninety-nine years, but an estate for ninety-nine years qualified by that restriction, 'if he should so long live;' because it so appeared upon the face of the will considered in all its parts and taken all together. But this case is stronger; because it appears clearly upon the very words of the whole will taken together, that there can be no doubt of the testator's intention 'that the *reversion* of the settled estate should *not* be included in it, but only the lands which he had in *possession*.'" In *Freeman* v. *The Duke of Chandos*, Cowp. 363, the testator devised all his estate &c. in the counties of Gloucester and Worcester, and elsewhere in the kingdom of England, to trustees, subject to certain charges thereon, and limitations, in his marriage settlement named, in trust to stand seised of the said estates in Gloucester and Worcester or elsewhere, to certain uses: the estates in Gloucester and Worcester were the only estates charged or mentioned in his marriage settlement; but he was also entitled to a *reversion* of certain estates in the counties of Oxford and Wilts: and it was held that this reversion passed by the words "elsewhere in the kingdom of England." In *Goodright* d. *Buckinghamshire* v. *Downshire*, 2 Bos. & Pull. 600, and in *Doe* d. *Cholmondeley* v. *Weatherby*, 11 East, 322, it was held, that, where there are general words in the residuary clause of a will, they will carry every estate and interest which is not expressly or by necessary implication excluded from its operation; and therefore carry all reversions. So, in *Morgan* d. *Surman* v. *Surman*, 1 Taunt. 289, it was held

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that a general residuary clause will carry estates not in the contemplation of the testator, unless the will contains special indications of a contrary intention. Mr. Justice Chambre there said: "The cases of *Goodtitle* v. *Miles*, *Strong* v. *Teatt*, and *Doe* d. *Davis* v. *Saunders*, 2 Cowp. 420, which had been cited in support of the first position [that the estate did not pass by the will], seemed to prove exactly the contrary; for, those were all cases in which there was a special indication of an opposite intention, which controlled the effect of the general words; but, where no such indication was to be found, the words here used were sufficient to carry the reversion." *Doe* d. *Nethercote* v. *Bartle*, 5 Barn. & Ald. 492, is to the same effect. In *Doe* d. *Moreton* v. *Fossick*, 1 Barn. & Adol. 186, the testatrix devised copyhold estates to her mother for life, then to F. and his wife for their lives, and afterwards to their children in fee: *all the residue of her estates, of what kind soever*, she bequeathed to her mother, her heirs, executors, &c., for ever; but she charged such residue of her estates both real and personal with an annuity of 20*l.* to her grandmother for life: it was held that the reversion of the copyhold estates must pass by the residuary clause.

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trine was held in *Doe* d. *Pell* v. *Jeyes*, 1 Barn. & Ad. 593. In *Goodtitle* d. *Daniel* v. *Miles*, the general words were limited and restricted by particular provisions and expressions contained in other parts of the will.

Mr. *Hodgson*, in reply.—If the intention of the testator had been as it is supposed, his object might have been secured without any risk by suffering a recovery. Where a party is tenant in tail in possession of one estate and tenant in fee of another, and by will disposes of all his disposable property, if the son who takes the estate tail derives also considerable benefit under the will, a court of equity will put him to his election either to take the estate tail or to take under the will. But the doctrine of election does not apply to this case. *Roe* d. *James* v. *Avis* is based upon sound principles, and is the only case cited that at all affects the present. There, A., being seised in fee tail of an undivided fourth part of an estate, and entitled to the reversion in fee of another fourth, expectant on the determination of an estate tail, by her will recited that she was entitled to the first, and devised it to B.C. in fee, and then directed "all the residue and remainder of her estate and effects" to be sold as soon as might be after her death, and her funeral expenses to be paid thereout, and the overplus (if any) to be divided between D. and E.: and it was held that the reversion did not pass by these general words. Undoubtedly, general words, if sufficient, will pass such an interest as the present, provided there be nothing in the other parts of the will to rebut the inference of intention; as in *Doe* d. *Cholmondeley* v. *Weatherby* and *Freeman* v. *The Duke of Chandos*. Here, the testator must have known that he possessed some estates of which he had not the power of disposing by will. [Lord Chief Justice *Tindal*.—He had the power of disposing of the reversion by will.] But not the power to create the limitations he has created.

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The following certificate was afterwards sent:—

"We are of opinion that the reversion in fee of the manors, estates, hereditaments, and premises in the county of Chester and county of the city of Chester, passed by the will of Sir Roger Mostyn; the words of the devise being sufficient to include such reversion, and no intention to exclude it being expressed in or necessarily to be implied from any other part of the will.

"N. C. TINDAL.
"S. GASELEE.
"J. VAUGHAN.
"J. B. BOSANQUET."

Wednesday, Jan. 14th.

The court will not entertain objections to the regularity of proceedings, where the party has neglected to avail himself

GRAVES v. WALTER and Wife.

THIS was an action of assumpsit brought to recover a sum of 8*l.* 17*s.*, for goods bargained and sold, and sold and delivered, by the plaintiff to the female defendant before her marriage. The defendants paid 5*l.* 5*s.* into court, and as to the residue of the demand pleaded the general issue,

award of venire the sheriffs were directed to try the *issue*, whereas *two issues* were joined between the parties; and also that there was no count in the declaration applicable to the work and labour which the jury had included in their verdict. The learned judge discharged the summons, on the plaintiff's consenting that the verdict should be reduced by the seven shillings. The plaintiff's attorney caused the return of the verdict to be altered accordingly, and thereupon signed final judgment, taxed the costs, and issued a testatum fi. fa., under which the defendants' goods were taken. The defendants again applied by summons to a judge at chambers, first, to set aside the judgment; and then for a review of the taxation: upon these summonses no orders were made. On the 11th of September, the defendants took out another summons to set aside the writ of testatum fieri facias for irregularity; whereupon the learned judge ordered that the plaintiff should be at liberty to amend the writ, which was done, the plaintiff paying the defendants' costs of and occasioned thereby. The writ was amended in pursuance of the last-mentioned order without re-sealing, and the defendants paid into the hands of the sheriffs 18*l.* 4*s.*, the sum indorsed thereon, and sheriffs' poundage, &c.

Mr. *Mansel*, on the part of the defendants, in the last term, obtained a rule calling upon the plaintiff to shew cause why the final judgment should not be vacated and arrested, and the trial set aside, and why the testatum fi. fa. issued on such judgment should not be set aside, for irregularity, and why the sheriffs should not repay to the defendant Charles Walter the sum of 18*l.* 4*s.* paid to him under the said writ (*a*). The principal objections urged

(*a*) The 1 Will. 4, c. 7, s. 4, provides, "that, notwithstanding any judgment signed or recorded or execution issued by virtue of that act, it shall be lawful for the court in which the action shall have

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were, that the judge's order gave the secondary no power to alter the verdict; that, in the award of venire and in the writ of trial, the sheriffs were directed to try the *issue*, whereas two issues were joined between the parties; that, in the postea, the promise was found to be by both defendants; and that the testatum fi. fa. was improperly amended without re-sealing.

Mr. Serjeant *Wilde* now shewed cause.—He submitted that the defendants had, by the course of proceeding on the several summonses taken out at chambers, and particularly by the acceptance of the costs of the amendment of the testatum fi. fa., waived all previous objections: they were bound to set the whole matter right on the earliest opportunity.

Mr. *Mansel*, in support of his rule.—The doctrine of waiver applies only to matters of mere irregularity. Here the proceedings are not merely irregular; they are erroneous: the jury should have pronounced their verdict upon the whole record. In *Engleheart* v. *Eyre*, 2 Dowl. 193, there was a plea of the general issue and a plea of set-off, and the record contained only a finding of the jury on the general issue, and none on the issue taken on the set-off, and it was assumed on all hands to be error.

been brought to order such judg- fit to direct." And by the 19th

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rd Chief Justice TINDAL.—I am of opinion, that, if objections suggested are objections that appear upon ace of the record, a writ of error will be the proper e for the defendants to adopt. But, where the aption is made to the court, their discretion will be reed by the previous conduct of the party applying. question for us to consider is, whether the defendants not waived all the objections they have now urged e course they adopted before the learned judge at bers. It appears to me that they have conclusively ed them by having, in pursuance of the judge's order, ved costs as the price of the amendment of the testafi. fa., without disputing his power to make such . With what grace do they now come to the court ge what might and ought to have been urged then? I heard of a more vexatious course of proceeding I have sat in this court.

e rest of the court concurring—

Rule discharged, with costs.

MILLS v. GOSSETT.

Wednesday, Jan. 14th.

A capias cannot be amended by the substitution of one form of action for another.

. Serjeant *Wilde* moved for leave to amend the writ pias in this case, by the substitution of "debt" for promises."

E COURT said the point had been considered on al occasions, when it had been determined that such dment could not be allowed.

Rule refused.

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Wednesday, Jan. 14th.

A servant is liable in an action of trover for a conversion for the benefit of his master.

The defendant received from one R. a bill of exchange with notice that it was the plaintiff's property, and that it had been placed in the hands of R. for the purpose of his procuring it to be discounted for the plaintiff. R. being indebted to the defendant's mother, in whose employ the defendant was, the latter appropriated the bill in discharge of Rs'. debt:-Held, that this was a

CRANCH *v.* WHITE.

THIS was an action of trover brought by the plaintiff to recover the value of a bill of exchange for 200*l.*, dated the 13th July, 1833, payable four months after date, drawn by the plaintiff on one Plympton, and indorsed by the plaintiff to one John Boyne, and also by one J. W. Roberts. At the trial before Lord Chief Justice Tindal, at the Sittings in London after last Michaelmas Term, Boyne, who was called as a witness on the part of the plaintiff, stated, that the bill in question was accepted by Plympton for the accommodation of the plaintiff, and by him indorsed to the witness for the purpose of the latter procuring it to be discounted for the plaintiff; that he, the witness, took it with this view to Roberts, indorsed it and left it with him, telling him the purpose for which he had received it; that the witness, having learned that Roberts had indorsed the bill and handed it over to the defendant, applied to the latter for the proceeds, explaining to him that the bill had been delivered to Roberts for the purpose of his procuring it to be discounted on the plaintiff's account; and that

a nonsuit entered—on the grounds that trover was not under the circumstances maintainable against the present defendant, but that the action should have been brought upon the contract, in which case the defendant would have been let in to a line of defence that was not admissible in trover; and that, he having acted in the business as the mere agent or servant of his mother, and being known to the plaintiff as so acting, the action should have been brought against her, and not against the son.—It is perfectly clear, upon the authority of *Stephens* v. *Badcock*, 3 Barn. & Adolph. 354, that, if this action had been for money had and received, instead of trover, it could only have been brought against the mother. In that case, J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client (which he was authorized to do), and gave a receipt signed "B., for Mr. J." J. was in bad circumstances when he left home, and he never returned; but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay over the money to the client: and, on assumpsit brought against him for money had and received, it was held that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it, the master on the other hand being answerable to the client for the sum received by his clerk; and there being no privity of contract between the plaintiff and defendant. So, here, the bill was received for the mother, whose agent the defendant was, and for whose acts she was liable. The question therefore is, whether, by changing the form of action to trover, a liability can be imposed upon the defendant to which he would not be exposed if the action were brought on the contract. [Mr. Justice *Park*.—What *contract* was there?] A contract to

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discount the bill or return it. [Lord Chief Justice *Tindal.*—There is no evidence whatever that the bill was received by the defendant upon any such contract.] It was proved that it was delivered to the defendant by Roberts with notice of the purpose for which the latter had received it. In *Jennings* v. *Rundall,* 8 Term Rep. 335, it was held that a plaintiff cannot convert an action founded on a contract, into a tort, so as to charge an infant defendant: and therefore, where the plaintiff declared that he had, at the defendant's request, delivered a mare to the defendant to be moderately ridden, and that the defendant, maliciously intending &c., wrongfully and injuriously rode the mare so that she was damaged &c.; it was holden that the defendant might plead his infancy in bar, the action being founded on a contract. The result of that case appears to be, that, although the forms of law allow tort to be maintained in some cases where an action on the contract will also lie, yet the rights of the defendant shall not be altered by the substitution of the one form of action for the other. So, in *Powell* v. *Layton,* 2 New Rep. 365, it was held, that, to an action on the case in the form of tort against one of several joint owners of a ship, for

It has been held that trover will lie against a servant on a conversion for the benefit of his master—*Perkins* v. *Smith*, 1 Wils. 328.] Under the circumstances, the mere demand on the present defendant, coupled with the mere non-delivery of the bill, was not sufficient evidence of a conversion.

Lord Chief Justice TINDAL.—Two objections are urged in this case to the verdict that has been found for the plaintiff—first, that, in point of law, upon the facts proved, trover was not maintainable, but the action should have been brought upon the contract—secondly, that, admitting trover to be the proper form of action, it should have been brought against Mrs. White, the mother of the present defendant, on whose account and for whose benefit the bill in question was received, and to whose use it was in fact applied.

With regard to the first objection, let us see what are the facts. The owner of the bill put it into the hands of Boyne for the purpose of procuring it to be discounted; Boyne delivered it to Roberts with full notice of the purpose for which he had received it; and Roberts delivered it to the defendant, who likewise had full knowledge of the circumstances under which it came to *his* hands; and the defendant (Roberts being indebted to his, the defendant's, mother, in whose service the defendant lived) received it, saying that he would keep it and place it to account. Upon these facts, I am at a loss to perceive any evidence of a contract with the defendant. When delivered to him for one purpose, he received and appropriated the bill to another. The argument urged on the part of the defendant is, that a plaintiff has no right to change or depart from the proper form of action in order to deprive his opponent of a defence. I perfectly accede to that proposition; but I do not see how it applies here. In *Powell* v. *Layton*, the court held, that, though the plaintiff had thought pro-

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per to bring tort, the defendant was not precluded from pleading in abatement the non-joinder of his co-owners, as he might have done had the plaintiff brought his action on the contract. So, again, in *Jennings* v. *Rundall*, the form of action being indifferently tort or contract, the court held that the plaintiff could not by suing in tort deprive the defendant of a defence of infancy which would have been an answer to an action on the contract. But, in the first place, I would ask what better defence would this defendant have if this action were founded on contract? Then, the two cases cited do not decide that the form of action in those cases was misconceived: but only that the defendants were to be let in to the same line of defence under the form of action the plaintiff had thought proper to adopt, that they might have availed themselves of under the other form of action. Therefore, at all events, the defendant would not be entitled to a nonsuit, as is contended for, even if the facts of the present case brought it within the principle laid down in *Powell* v. *Layton* and *Jennings* v. *Rundall*.

With respect to the second objection—The general understanding of the profession always has been that all par-

disposed of them to his master's use, which his master could give him no authority to do; and this is a conversion in Smith, this *disposal* being his own tortious act (*a*)." And that case was fully recognized and adopted in *Stephens* v. *Elwall*, 4 Mau. & Selw. 259 (*b*). Applying the principle of these cases to the present—the defendant cannot justify the act complained of by any authority derived from his mother either prior or subsequent to the time of committing it. But it is said there is no conversion. It is true that the mere refusal to deliver up the thing does not of itself amount to a conversion; but, where there is no evidence on the other side, a conversion may thence be inferred. Here, the bill in question was delivered on a bailment to the party from whom the defen-

(*a*) His lordship goes on to say: "*The act of selling the goods is the conversion*, and, whether to the use of himself or another, it makes no difference. The finding that the defendant disposed of the goods *for his master's use*, is only the conclusion of the jury, and does not bind the court: the taking upon him to *dispose of* another's property is the tortious act, and the gist of this action." The present case seems to carry the principle a little further than that of Perkins v. Smith: there, the clerk not only received the goods, but actually *sold them*, and accounted to his master's assignees for the proceeds; whereas here, it only appears that the clerk received the bill in question on behalf of his employer, not that he *disposed of it*. In Stephens v. Elwall the defendant sent the goods to his master in America.

In Sayer's report of Perkins v. Smith (Sayer, 40), Lord Chief Justice Lee is made to say: "If a servant, by the command of his master, do a tortious act, the master is certainly liable to an action: but, as the command of a master does neither justify nor excuse his servant in doing a tortious act, the servant is also liable. In the case of Lane v. Cotton, 12 Mod. 488, the following distinction, which in our opinion is well founded, was taken by Lord Chief Justice Holt, viz. that, where an injury arises from the neglect of a servant, an action only lies against his master; for that a servant is not answerable, quatenus servant, for neglect; but that, where an injury arises from the misfeasance of a servant, he is himself liable to an action, not quatenus servant, but as being a wrongdoer."

(*b*) See also Greenway v. Fisher, 1 Car. & Payne, 190.

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dant obtained it, and received by the defendant with notice of that fact; the defendant's detention of it after demand, was therefore evidence sufficient to warrant the jury in finding a conversion by him. Lord Coke, in 10 Rep. 56 b., says, "That, if A. brings an action against B. upon trover and conversion of plate, jewels, &c., and the defendant pleads not guilty, now it is good evidence primâ facie to prove a conversion, that the plaintiff requested the defendant to deliver them, and he refused; and therefore it shall be presumed that he has converted them to his own use." So, in 1 Rolle's Abridgment, 5, (L) 2, it is said: "Si home trove me biens et conust eux d'estre mon biens, et jeo eux demand de luy, et il refuse et denie a eux deliverer a moy, ceo est un convercion en ley." Again, (L) 3: "Si jeo baile biens al auter, et puis il denie a render eux al moy sur mon demand de eux, uncore ceo n'est ascun convercion, mes solement evidence d'un convercion, entant qu'il venoit al eux per mon bailment demesne."

Upon the whole, therefore, it seems to me, under the circumstances proved at the trial, that trover was maintainable, and also that the action was properly brought against the present defendant.

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for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion, for, a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from any other, who had no authority himself to dispose of it." Here, the defendant acted with perfect knowledge that he had no right to apply the bill as he did: and, though ignorant, he would still have been guilty of a conversion. I think that case is not to be distinguished in the slightest degree from the present. All the authorities were considered in *Alexander* v. *Southey*, 5 Barn. & Ald. 247. There, the plaintiff's goods, which had been saved from fire, were carried to a warehouse by the servants of an insurance company, of which warehouse the defendant as one of the servants of the company kept the key, and, on being applied to by the plaintiff to deliver up the goods to him, he refused to do so without an order from the company. It was left to the jury to say whether this qualification of the defendant's refusal was a reasonable one, the learned judge telling them that, if so, he was of opinion that there was not sufficient evidence of a conversion: and the court confirmed that ruling—holding that this was not such a refusal as amounted to a conversion. Here, however, an *actual* conversion was proved.

Mr. Justice VAUGHAN.—I am of the same opinion. The question is whether all the requisites to the maintenance of an action of trover concur in this case—right of property and of possession in the plaintiff, possession in the defendant, and a wrongful conversion by him. It appears to me that they do. There was beyond doubt a wrongful conversion by the defendant. He received the bill for one specific purpose, and appropriated it to another. Where a servant does an act of this sort without notice or knowledge of the circumstances, he is not responsible: but, where he acts

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with full knowledge, the case is different. If the clerk in *Stephens* v. *Badcock* had received a bag of money, and had parted with it to a person who was not entitled to it, no doubt he would have been liable in trover at the suit of the true owner. In *Saxby* v. *Wynne*, Starkie on Evidence, 2nd edit. 842, where A. deposited goods with B., and then sold them to C., and afterwards directed B. to deliver the goods to D.—it was held that B. was not guilty of a conversion in delivering the goods to D. But it would have been otherwise had B. been cognisant of the prior sale of them to C.

Mr. Justice BOSANQUET.—Upon the evidence given at the trial I am clearly of opinion that the present defendant was liable for the wrongful appropriation of the bill in question with full knowledge of the purpose for which it had come to the hands of Roberts. It appears to me to have been sufficiently shewn by my Lord Chief Justice, that there was no contract in this case in respect of which the plaintiff could sue. But, admitting that there was, the defendant has not availed himself of the right he would have to plead in abatement the nonjoinder of his mother.

at the Sittings in the course of the present term. It appeared that the assignment of the bond was executed by the under-sheriff in the presence of two persons, one of whom attested it by his signature thereto at the time, the other after the commencement of the action. A verdict having been found for the plaintiff—

Mr. *Martin* moved for a new trial, on the ground that this was not a sufficient execution of the assignment to satisfy the statute 4 & 5 Anne, c. 16, s. 20, by which it is enacted, "that, if any person or persons shall be arrested by any writ, bill, or process issuing out of any of the courts of record at Westminster, at the suit of any common person, and the sheriff or other officer take bail from such person against whom such writ, bill, or process is taken out, the sheriff or other officer, at the request and cost of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail-bond or other security taken from such bail, by indorsing the same, and *attesting it under his hand and seal, in the presence of two or more credible witnesses.*" He submitted that the assignment was void unless made strictly in the form pointed out by the statute; and that it was essential, and the universal practice, that both the attesting witnesses should subscribe it at the time: but he admitted that there was no decision upon the subject.

Lord Chief Justice TINDAL.—I am of opinion that there is no ground for this objection. All that the statute requires, is, that the sheriff shall assign the bail-bond to the plaintiff in the action, by indorsing the same, and attesting it under his hand and seal, *in the presence of two or more witnesses.* That has been done in the present case. It is admitted that the under-sheriff indorsed the assignment on the back of the bond, that he attested or executed such assignment under his hand and seal, and that this was

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done in the presence of two competent witnesses. We are not to superadd to the requisitions of the statute, that the witnesses shall both sign at the time. Where the legislature have intended to require the attestation of the witnesses to be made at the time of the execution of the instrument, they have expressed themselves to that effect; for instance, such are the words to be found in the 5th section of the statute of frauds, 21 Car. 2, c. 3, which declares that "all devises and bequests of any lands or tenements devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be *attested and subscribed in the presence of the said devisor* by three or more credible witnesses, or else they shall be utterly void and of none effect." Therefore, it appears clearly, that, where the legislature wished to impose as a condition precedent to the validity of the execution of the instrument, that such execution should be at the time attested by the signatures of the witnesses, they well knew how to do it. And the

[redacted]

1836.

Tuesday, Jan. 20th.

Although the sheriff is not usually allowed costs on a motion under the interpleader act, yet, where he has retained possession of the goods seized at the request of the execution creditor, and has sold them with consent of all the parties, and the execution creditor afterwards abandons his claim, the sheriff is entitled to receive from him his costs of such possession and sale.

DABBS *v.* HUMPHRIES.

ON the 25th February, 1834, the sheriff of Sussex, under a fi. fa. issued by the plaintiff against the defendant, seized certain property which was subsequently claimed by two persons named Firminger and Aylmore. On the 3rd of May, the sheriff (without any communication with the execution creditor, who had interfered no further than in causing the writ to be issued and delivered to the sheriff) applied for relief under the interpleader act, 1 & 2 Will. 4, c. 58, s. 6. The learned judge to whom the application was made, directed certain issues to be tried between the parties, in order to ascertain in whom was the property in the goods seized; and it was agreed that the goods should in the meantime be sold by the sheriff, the proceeds to abide the event. They were sold accordingly on the 23rd May for the sum of 139*l.* 8*s.* The execution creditor afterwards abandoned his claim, and, by order of a judge, the sheriff paid over to Firminger 116*l.* 2*s.*, and to Aylmore 12*l.*, on account of their respective claims, and paid the balance (11*l.* 6*s.*) into court.

Mr. *Clarkson*, in the course of the last term, on the part of the sheriff, obtained a rule calling upon all the parties to shew cause why this sum of 11*l.* 6*s.* should not be paid out to him, for the expenses incurred in the sale of the goods; and also calling upon the execution creditor to shew cause why he should not repay to the sheriff the sum paid to the auctioneer on the sale, together with the sum of 15*l.*, the expenses of keeping possession of the goods, and also his costs of both applications to the court.

Mr. Serjeant *Bompas*, who appeared on behalf of Firminger and Aylmore, submitted that they, whose goods it was admitted had been improperly seized, and as against whom

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consequently the whole proceedings were wrongful, ought not to be called upon to pay the sheriff's costs, even if he were entitled to any—*Bishop* v. *Hinxman*, 1 Dowl. 166.

Mr. *Barstow*, for the execution creditor, also contended that he ought not to be visited with costs, inasmuch as no mala fides or improper conduct was attributed to him; but that the sheriff, who had seized the goods in question in the ordinary course of his duty, must bear them.

Mr. *Clarkson*, for the sheriff, admitting that his rule claimed too much, insisted that he was at all events entitled to the costs of keeping possession of the goods from the 25th February to the 23rd May; and that, though the sheriff was not usually allowed costs, yet under special circumstances they had sometimes been granted to him. He cited *Bryant* v. *Ikey*, 1 Dowl. 428.

Lord Chief Justice TINDAL.—It appears to me that the justice of the case will be attained by making this rule absolute as far as regards the costs of keeping possession of the goods from the 3rd to the 23rd of May, and the costs

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the judge. At all events, after the 3rd of May the :riff became the agent of the execution creditor, there ng a necessity for keeping possession of the goods m that time. I therefore think the execution creditor st pay the sheriff the costs of keeping possession of the ›ds for the period mentioned, as well as the costs of the e, and also of this application, he being necessarily ›ught here to obtain payment of those costs. Firminger l Aylmore are also entitled to have their costs paid by : execution creditor, and the 11*l.* 6*s.* remaining in court st be paid out to them.

The rest of the court concurring—

Rule accordingly (*a*).

a) In Thompson v. Sheddon, t, Easter Term, costs were re- ed both to the sheriff and the cution creditor, where, after sheriff had obtained the rule, claimant gave notice that he ndoned his claim: Lord Chief Justice *Tindal* observing that he was not disposed to give costs in any case under the interpleader act, unless it appeared that the party as against whom the costs were applied for had been guilty of grossly improper conduct.

LAYTHOARP *v.* BRYANT.

Friday, Jan. 16th.

On a sale by auction of the unexpired term granted by a lease of which

'HIS was an action of assumpsit by the vendor against : vendee of certain leasehold premises that had been sold

plaintiff was assignee, one of the conditions provided that the purchaser should not require the luction of any title *prior to the lease.* The defendant was the highest bidder, but, on the ab- ct being delivered to him, he immediately returned it, saying that he had merely bid at the re- st of the vendor. In an action against him for loss on a re-sale in consequence of his not com- ing the purchase, the declaration stated that the plaintiff was possessed of "a certain lease," :ribing it:—Held, that he was bound to support that allegation by proof of the lease in the or- ary way, viz. by calling the attesting witness or properly excusing his absence; and that proof n assignment to himself (prepared by the solicitor of the lessor), and of his occupation under it ten years, was not sufficient—nothing having occurred between the parties to amount to an ad- sion on the part of the purchaser of the genuineness of the lease.

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by auction, to recover the amount of loss on a re-sale on non-completion of the purchase by the latter.

The declaration stated that the plaintiff, on the 3rd of December, 1833, by one T. Ross, his auctioneer and agent in that behalf, caused to be put up and exposed to sale by public auction a certain lease of a certain house, shop, and premises, for a certain unexpired term of twenty-five years from Lady-Day then last, upon and subject to the following amongst other conditions of sale, that is to say, that the purchaser should have and accept an assignment of the lease under which the vendor held the premises, and which, agreeably to a clause in the lease, was to be furnished by the solicitor for the time being of the original ground landlord, at the purchaser's expense, on completing the purchase agreeably to the said conditions, *and should not require the production of any title prior to such lease;* that the purchaser should pay into the hands of the auctioneer twenty-five per cent. in part of the purchase money; that, if he should fail to comply with the conditions of sale, the deposit money should be forfeited to the vendor, who should be at liberty to proceed to another sale without notice to the purchaser; that

: had that day purchased the premises for the sum of
:1*l.*, subject in every respect to the said conditions of
le; that the defendant then and there, in consideration
' the premises, and that the plaintiff, at the special in-
ance and request of the defendant, had then and there
ndertaken and faithfully promised the defendant to per-
rm and fulfil all things in the said conditions of sale con-
ined on the part of the vendor to be performed and ful-
lled, undertook and then and there faithfully promised
e plaintiff to perform and fulfil everything in the said
nditions of sale on his part and behalf as such purchaser
aforesaid to be performed and fulfilled: that, although
e plaintiff was possessed of such lease as aforesaid for
e said unexpired term in the conditions mentioned, and
id afterwards, to wit, on &c., at &c., produce such lease
the defendant, and then and there requested the de-
endant to accept an assignment thereof; and although the
hen solicitor for the original ground landlord was always
rom the time of such sale hitherto ready and willing to,
nd did, afterwards, to wit, on &c., at &c., furnish and
repare an assignment of the said lease; and although the
laintiff was always ready and willing to execute such as-
ignment, and thereby to assign the said lease to the de-
endant, at the expense of the defendant, on his paying
he said purchase money, according to the said terms and
onditions of sale, to wit, at &c.; and although the plain-
iff was always after the said sale ready and willing to per-
orm the said conditions of sale in all things therein con-
ained on his part to be performed and fulfilled, whereof
he defendant then and there had notice: yet the defen-
lant, not regarding the said terms and conditions of sale,
or his said agreement or promise and undertaking; but
ontriving and fraudulently intending craftily and subtilely
o deceive and defraud the plaintiff in that respect, did
ot nor would, although he was afterwards, to wit, on &c.,
t &c., requested so to do, accept such assignment of

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the said lease, or pay or cause to be paid to the plaintiff the residue of the said purchase money, or any part thereof; but then and there wholly neglected and refused so to do, and then and there wholly refused then or at any other time to complete the said purchase: that thereupon the plaintiff, afterwards, to wit, on &c., according to and by virtue of the said conditions of sale, again exposed the said tenements to sale by public auction, under and subject to certain terms and conditions of sale, and the same were then and there at such last-mentioned exposure to sale as aforesaid resold for a much less price or sum of money than the said price or sum for which the same had been so sold to the defendant, to wit, for the sum of 194*l.* 5*s.*, whereby there then and there was a deficiency between the said price for which the tenements were so sold to and agreed to be purchased by the defendant, and the said price for which the same were so sold on such resale, to a large amount, to wit, to the amount of 246*l.* 15*s.*; and the charges attending such resale as aforesaid then and there amounted to a certain other large sum of money, to wit, the sum of 28*l.* 0*s.* 10*d.*: yet the defendant, further disregarding the said conditions of sale, and his said promise and

bly to a clause in the lease, is to be furnished by the solicitor for the time being of the original ground landlord), at the purchaser's expense, on completing the purchase greeably to the said conditions, and *shall not require the production of any title prior to such lease.*" It was further provided by the conditions—" that the purchaser should pay into the hands of the auctioneer *25l.* per cent. in part of the purchase money; that, if he should fail to comply with the conditions of sale, the deposit money should be forfeited to the vendor, who should be at liberty to proceed to another sale without notice to the purchaser; that, whatever deficiency might arise, together with all charges attending the same, should immediately after such resale be made good by the defaulter; and that, in case of non-payment of the same, the whole should be recoverable by the vendor as liquidated damages, without the necessity of previously tendering an assignment to the purchaser." At the time of the purchase the defendant signed the usual memorandum, but was not required to pay any deposit. Shortly after the sale the vendor's solicitor sent the defendant an abstract of the title, which the defendant immediately returned, alleging that he had merely become a bidder at the vendor's request. The defendant refusing to accept an assignment when tendered to him, the vendor put up the lease to auction again, and sold it for 194*l.* 5*s.*, and sued the defendant for the difference between that sum and the sum for which it had been knocked down to him. The assignment under which the plaintiff had held the premises for ten years, and which was shewn to have been prepared by the solicitor of the ground landlord, was put in and duly proved. The original lease from the ground landlord was also produced; whereupon it was insisted on the part of the defendant that it was necessary that the execution of this lease should be proved by calling the subscribing witness or shewing that his production was impossible: and *Crosby* v. *Percy*, 1 Camp. 303, was cited,

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where Sir James Mansfield held that an assignee of a lease, to shew his interest in the premises, is bound to prove the execution of the lease and all the mesne assignments. For the plaintiff was cited *Thompson* v. *Miles*, 1 Esp. 185, where Lord Kenyon ruled, that, where a party, to prove a right of way or the like, produces several deeds by which such right of way has been granted, and proves the enjoyment by him of the right, he is not bound to prove the deeds themselves by the subscribing witnesses. The learned judge, conceiving the proof of the lease to be essential to the maintenance of the action, nonsuited the plaintiff.

Mr. Serjeant *Bompas*, in Hilary Term last, obtained a rule nisi that the nonsuit might be set aside and a new trial had, on the ground that the proof for default of which the nonsuit passed was not requisite.

Mr. Serjeant *Wilde* and Mr. *Busby* now shewed cause.—The plaintiff in his declaration averred that he was possessed of the lease in the fourth condition mentioned: and there is no rule of law that dispenses with proof of such an

uthorities cited to shew under what circumstances the roduction of the subscribing witness may be dispensed rith: and, upon the authority of that case, as well as upon eneral principles, the defendant was clearly entitled to ave the lease in question duly proved. So inflexible is his rule, that, in *Johnson* v. *Mason*, 1 Esp. 89, it was held hat a party who has executed a deed shall not be permitted to acknowledge it in court; it must be proved by the ubscribing witness. In *Purvis* v. *Rayer*, 9 Price, 488, it as held, that, if a contract be made for the sale of leaseold property unconditionally and without any stipulation n terms, on the part of the vendor, that he will not warant his lessor's title, he is bound to shew to the satisfacon of the purchaser that his lessor, or the original granr of the term, was entitled to grant the lease: he cannot herwise oblige the purchaser to complete the contract ade for the purchase of the premises. In the present se, the only effect of the fourth condition of sale was, to ispense with proof of the *lessor's* title.

Mr. Serjeant *Bompas* and Mr. *Steer*, in support of the le.—The possession of the property and of the title eds is primâ facie evidence of title. All the text books at treat of the subject lay it down as a general rule that e proof required in the present case has never in practe been given: and *Thompson* v. *Miles* is the authority ferred to in support of that position. Lord Kenyon there id "he would never allow it, where the question was reecting a title, that the party should be called upon to ove the execution of all the deeds deducing a long title; at it was never mentioned in the abstract, or expected making out a title in any case of a purchase, more parnlarly where possession had accompanied them." And ough Sir James Mansfield ruled the contrary in *Crosby* *Percy;* yet, as Sir E. Sugden says (V. & P., 9th edit. 1) "Lord Kenyon's decision was not adverted to; and,

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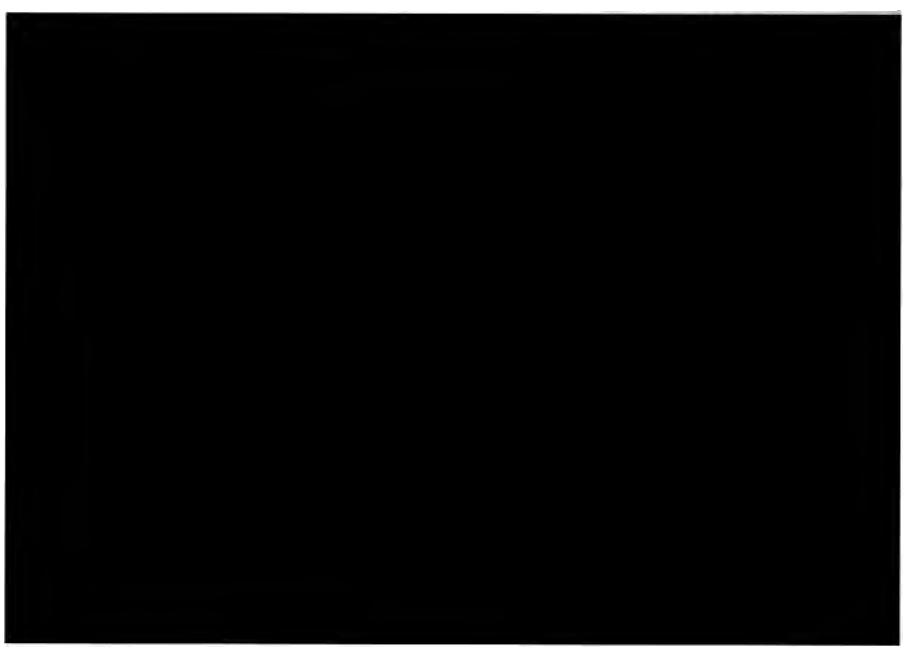
as that case clearly concides with the practice in these cases, it can scarcely be considered as overruled (*a*)." *Purvis* v. *Rayer* is a case in equity: the question there was, not whether the deed should be *proved*, but merely whether it should be *produced*—production being all that is usually required in equity. In *Nash* v. *Turner*, 1 Esp. 217, it was held, that, where there had been an assignment by deed, it was sufficient to prove the assignment by calling the subscribing witness, without calling the witness to the original deed; Lord Kenyon observing "that it was sufficient to prove by the subscribing witness the execution of the assignment, for the assignment having adopted the original deed in all its parts it became as one deed, and proof of it was therefore sufficient for the whole." [Lord Chief Justice *Tindal*.—In that case the deed was between the parties.] In *Morgan* v. *Morgan*, 2 M.& Scott, 490, where an attesting witness to the execution of a bond could not be found after diligent inquiry, proof of his handwriting was held to be properly admitted, although a letter (but not stating where he was nor the place from whence it came) had been received from him a few days previously to the trial.



pon which a correspondence or verbal communica-
:ake place, and the questions that usually arise are
questions of law as to the effect of some deed or in-
ent stated in the abstract. In all these cases it may
vell be said that the party assumes the deeds to be
ıs upon the face of them they appear to be, and, the
natter in dispute being as to what may be their legal
, the necessity of formal proof is dispensed with, and
ırchaser cannot turn round at the trial and dispute
genuineness. The present case, however, stands
led of all these circumstances: the abstract was re-
l by the defendant; and there is nothing whatever
intercourse that has taken place between the par-
:nding to shew that the defendant has admitted, or
ught to have the legal effect of compelling him to
, the deeds as stated in the abstract. The plaintiff
declaration avers that he was possessed of the lease
:stion for the unexpired term in the conditions men-
l. Is he not, therefore, bound to support that aver-
by the ordinary legal proof? In the case of contracts
e sale of personal property generally, the bare fact of
ssion is primâ facie evidence of property in the sel-
ıut, in the case of leasehold property, the lease is the
symbol of possession; and, before the court can look
it must be brought before them by the ordinary legal

There being nothing in this case to preclude the
dant from questioning the genuineness of the lease,
ms to me to fall within the ordinary rule that the
iff shall only recover secundum allegatum et proba-
If it had been so intended, it would have been very
'or the plaintiff to have provided in the conditions of
hat the proof in question should not be required.
ıerefore, the general rule of law is that instruments
seal can only be brought to the knowledge of the
by the evidence of the attesting witness, except
: he is dead or those circumstances convene which

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have been held to excuse his nonproduction, and such proof has not been afforded in the present case, or dispensed with by the defendant, I am of opinion that the plaintiff is not entitled to recover. Another exception from the general rule is, where the deed is to be used adversely to the interest of the party who produces it: there, the calling of the subscribing witness is dispensed with. Upon the whole I am of opinion that we may decide the present case without at all interfering with either of the Nisi Prius cases to which reference has been made, or deciding which of them ought to be adhered to.

Mr. Justice VAUGHAN.—I must confess that my mind has fluctuated during the consideration of this case: but upon the whole I am disposed to agree with my Lord Chief Justice that we may decide it upon its own peculiar circumstances, without reference to the cases cited. Certainly there is considerable weight of authority on either side of the question—Lord Kenyon having said, in *Thompson* v. *Miles*, that " he would never allow it, that, where the question was respecting a title, the party should be called upon to prove the execution of all the deeds deducing a

from difficulty, I agree that it is not necessary on the present occasion to decide upon the question raised in *Thompson* v. *Miles* and *Crosby* v. *Percy*. The deed in respect of which the plaintiff's proof has failed here is the foundation of the action: he was bound to prove that he sold that which he has alleged. In his declaration, the plaintiff states that he was possessed of and sold to the defendant the lease mentioned in the conditions of sale: this allegation he was bound to prove. I do not say, that, where the vendor is in possession of the lease, he is bound to prove all mesne assignments. The ground of my opinion is, that it was necessary for the plaintiff to prove the original instrument—the subject matter of the contract he has declared on. My judgment does not proceed on the fourth condition, because the vendee thereby in effect agrees to dispense with the production of the landlord's title. The plaintiff was bound to shew the creation of the estate he professed to have sold. Upon the whole I think the nonsuit right.

Mr. Justice PARK.—At the trial I certainly paid but little attention to the authorities that were cited: I thought then and do still think that they are far from satisfactory. I agree with the rest of the court, that it is not necessary on the present occasion to lay down any general rule. The plaintiff averred that he was possessed of a certain lease for the unexpired term in the conditions of sale mentioned: he was bound to make out that allegation. I nonsuited the plaintiff because he was not prepared with legal proof of the lease; conceiving that to be the very essence and foundation of his action. I certainly rely very much upon the fourth condition of sale, which provides that the purchaser shall not require the production of any title prior to the lease. Production means legal production by legal proof. The plaintiff having particularly specified the lease as the point anterior to which no title was to be pro-

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duced, has in my judgment conclusively bound himself to prove the due execution of that instrument itself.

Rule discharged.

Under particular circumstances, the courts will, even after argument on a rule for entering a nonsuit, and after judgment pronounced, grant leave to amend the declaration, on payment of costs.

Mr. Serjeant *Bompas* afterwards prayed that the plaintiff might have a new trial, with leave to amend, on payment of costs. He submitted that this being a doubtful question of law, the court might well exercise their discretion in granting a new trial on the terms proposed: and cited *Atkinson* v. *Bell*, 8 B. & C. 277, 2 Man. & R. 292, where, in an action for goods bargained and sold, the plaintiff having been nonsuited on the ground that the proper form of declaring, under the particular circumstances of the case, was for the breach of contract in not accepting the goods, the court, after argument of a rule for setting aside the nonsuit and entering a verdict for the plaintiffs, allowed them to have a new trial, with liberty to add such a count to the declaration.

The Court, after time taken to consider, assented to the

'oseph Sutton and one West (the bail), as his sureties, gave he plaintiff a warrant of attorney for the amount indorsed pon the ca. sa. At the time of executing the warrant of ttorney, West, in the presence of the other two parties, onsented that the plaintiff should prove under the fiat gainst George Sutton for the amount of his judgment. 'he plaintiff accordingly proved the debt on the 25th Auust; and, no dividend being likely to be realised, and efault having been made in payment of the sum secured y the warrant of attorney on the day named in the defeaance, the plaintiff entered up judgment thereon.

Mr. Serjeant *Atcherley*, on the part of the sureties, obtined a rule calling upon the plaintiff to shew cause why is judgment should not be set aside, on the ground that, y his election to prove for the debt under the fiat, he had conerated the sureties.—He cited *Linging* v. *Comyn*, 2 'aunt. 246, where it was held, that, if a plaintiff, after idgment obtained, proved his debt under a commission of ankrupt sued out against the defendant, and also proeeded against the bail, the bail were thereby entitled to ieir discharge under the 49 Geo. 3, c. 121, s. 14, and the ourt would discharge them on motion: and also the 59th ction of the 6 Geo. 4, c. 16, which is in substance a reactment of s. 14 of the 49 Geo. 3, c. 121.

Mr. Serjeant *Andrews* shewed cause.—*Linging* v. *Comyn* clearly distinguishable from the present case: the cirimstances are essentially different. The sureties were vare of the existence of the fiat at the time they executed ie warrant of attorney, and one of them requested the laintiff to prove the amount against the bankrupt's estate, order to lessen their liability. The 6 Geo. 4, c. 16, s.) (*a*), applies only to debts due from the bankrupt at the

a) Which, amongst other things, acts—"That no creditor who has brought any action or instituted any suit against any bank-

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DUNCAN v. SUTTON.

time of his bankruptcy, whereas the present demand arises out of a security given subsequently.

Mr. Serjeant *Atcherley*, in support of his rule.—The judgment against the three cannot be supported after the plaintiff has proved under the fiat for the whole of his demand against George Sutton. The intent of the act was that the creditor should have the option of pursuing one of two remedies. By proof under the fiat, the bankrupt's estate is charged and the bankrupt himself discharged; but, if this judgment be allowed to stand, the consequence will be this, that the bankrupt will remain liable to the extent of any payment which the sureties may be compelled to make under it. [Lord Chief Justice *Tindal*.—This is an application to the discretion of the court: unless justice requires our active interference, our proper course will be to leave the parties to an audita querela.] The plaintiff's right to take the security is not doubted: but, as he has made his election to go against the estate, he cannot afterwards incidentally charge the bankrupt; and no consent on the part of West could operate to the prejudice either of the bankrupt or of his co-surety. It is contrary to the

The court there said that "The effect of the statute was, that, after the plaintiff had proved under the commission, he could not take the defendant in execution; and the bail were only liable in case the plaintiff, being entitled by his judgment to take the defendant on a ca. sa., should be unable so to do. This act was made in favour of bankrupts; but, if the plaintiff's construction should prevail, it would not have the proposed effect, for the bankrupt would become liable at the suit of the bail for the money which the bail should pay." That is precisely in point. The warrant of attorney here was a mere additional security given for an existing debt.

Lord Chief Justice TINDAL.—I entertain considerable doubt as to whether this case comes at all within the 59th section of the 6 Geo. 4, c. 16. That clause applies only to actions brought upon demands accruing prior to the bankruptcy. This, however, was a new and different security given subsequently. It would be too much to say that the demand the plaintiff is now seeking to enforce is the very debt due before the issuing of the fiat. If so, the sureties would still be liable, though the bankrupt were discharged. But, inasmuch as the parties consented to the proof at the time of giving the security in question, I think we ought not to interfere.

The rest of the court concurring—

Rule discharged, with costs.

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Wednesday, Jan. 21th.

To a declaration in the common form on a bill of exchange (indorsee against acceptor), the defendant pleaded, that, at the time of the drawing, acceptance, and indorsement of the bill, the drawer was a married woman, and that her husband was still living. The plaintiff replied that the bill was drawn and indorsed by the feme as the agent and by the authority of her husband:—Held, a sufficient answer to the plea, and no departure from the count.

PRINCE *v.* BRUNATTE.

ASSUMPSIT on a bill of exchange. The declaration stated that one Sarah Ellwood, on the 23rd July, 1834, made her bill of exchange in writing, and directed the same to the defendant, and thereby required him to pay to the order of the said Sarah Ellwood 17*l.* 10*s.* 10*d.*, one month after the date thereof, which period had elapsed; that the defendant then and there accepted the said bill; that the said Sarah Ellwood then and there indorsed the same to the plaintiff; and that the defendant then and there promised the plaintiff to pay him the amount of the said bill according to the tenor and effect thereof and of the said acceptance and indorsement.

The defendant pleaded that the said Sarah Ellwood, the supposed drawer, payee, and indorser of the said bill of exchange, before and at the time of the supposed drawing, acceptance, and indorsement thereof, was, and from thence hitherto had been and still was the wife of and married to a male person of the name of Thomas Ellwood, who then was and from thence hitherto had been and still was the husband of the said Sarah Ellwood, and that

ıch agency or authority should be averred in the count, it is an essential preliminary to the creation of any in-rest on which an indorsee can be entitled to sue; and ıat the omission of such averment in the count cannot be ıpplied or remedied by averment in the replication, such rerment in the replication being a departure from the ount, in which the bill is alleged to have been drawn and ıdorsed by a person who appears to have been a princi-al and not an agent.

The plaintiff joined in demurrer.

Mr. Serjeant *Talfourd*, in support of the demurrer.—In *Barlow* v. *Bishop*, 1 East, 432, 3 Esp. 266, it was held, that, though a note were given to a married woman (known to be such), with intent that she should indorse it to the plaintiff in payment of a debt which she owed him (in the ourse of carrying on a trade in her own name by the con-ent of her husband), yet the property in the note vested ı the husband by the delivery to the wife, and no interest assed by her indorsement to the plaintiff. Subsequent ecisions, however, have engrafted certain exceptions upon he rule laid down in that case. Thus, in *Cotes* v. *Davis*, ı Camp. 485, it was ruled by Lord Ellenborough, that, if ı note is made payable to a married woman, and she in-dorses it for value in her own name, and the maker af-terwards promises to pay it; in an action against him by the indorsee, it will be presumed that the nominal payee had authority from her husband to indorse the note in that form, and the indorsement will be considered as vesting a legal title to the note in the plaintiff: and in *Prestwick* v. *Marshall*, 5 M. & P. 513, 7 Bing. 765, 4 C. & P. 594, it ras held that the indorsement by a married woman, with ıer husband's assent, of a bill drawn by her, is binding pon him, and will pass the interest in the bill to the in-orsee, so as to enable him to sue the acceptor. Upon eference to the record in this latter case, it will be found

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that the declaration contained a second count which supplied that which ought to have been set forth as the contract here, viz. the agency of the wife.—At all events, the replication is a departure from the declaration: in the latter it is averred that the bill was drawn and indorsed by Sarah Ellwood as principal, and in the former that she drew and indorsed it as the agent and by the authority of her husband. This, according to the principles laid down by the authorities collected in Com. Dig. Pleader, F. 5, 6, 7, is clearly a departure.

Mr. *Comyn*, contrâ.—The defendant having permitted the bill to be sent out to the world upon the credit of his acceptance, he cannot now be permitted to dispute the authority of the drawer. The fact of the drawing and acceptance of the bill, and of its receipt and indorsement, and the circumstances attending the indorsement, are all mere matters of evidence dehors the bill. The rules of law as to indorsement stand precisely as they did before the promulgation of the modern regulations which compel parties to put upon the record the precise ground of their defence: all that is here stated might formerly have been

case of *Cotes* v. *Davis*—for any thing that appears, the e's agency might have been averred; and in *Prestwick* *Marshall*, for the reason already stated, the question of m could not arise.

Lord Chief Justice TINDAL.—This action is brought up- a bill of exchange which is stated in the declaration to ve been drawn by one Sarah Ellwood upon and accept- l by the defendant, payable to the order of Sarah Ell- ood, and by her indorsed to the plaintiff. In answer to is declaration, the defendant pleads that Sarah Ellwood, t the time of the supposed drawing, acceptance, and in- orsement of the bill, was the wife of one Thomas Ell- ood, and that the husband was still living. By way of plication to that which is primâ facie an answer to the tion, the plaintiff states that Sarah Ellwood at the time f her drawing and indorsing the bill drew and indorsed he same as the agent and by the authority of her hus- band. To this replication there is a special demurrer. On the part of the defendant it is contended that the re- plication is a departure from the declaration. Undoubt- edly, where the replication is inconsistent with or fails to fortify the statement in the declaration, it is a departure, and the plaintiff is out of court: for, he cannot set up one right by his declaration, and another in his replication. The only question therefore is, whether the matter dis- closed in this replication does set up a title inconsistent with that alleged in the count. It appears to me that there is no departure. The declaration states a deriva- tive title to the bill in the plaintiff through Sarah Ellwood the drawer, and the title set forth in the replication is equally derived through her. It is true that she, being a married woman, could have no right to draw the bill ex- cept by authority from her husband. But the defendant, by accepting the bill, recognized her right to draw it, and is therefore estopped from now disputing it. The diffi-

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culty is, whether she had a right to indorse it. The plication states that she indorsed the bill as the agent by the authority of her husband: so that, taking the w record together, it appears sufficiently that she had thority from her husband to indorse as well as to draw the bill in her own name; and consequently the def raised by the plea falls to the ground. This agrees the decided cases; for, though Lord Kenyon, in *Ba* v. *Bishop*, is reported to have said—" that the deli of the note to the wife vested the interest in her husb and, as he permitted her to carry on trade on her own count, and this was a transaction in the course of that tr if she had indorsed the note in the name of her husband was not prepared to say that that would not have avai as many acts of this nature may be done by a power of torney, and the jury might have presumed what was cessary in favour of an authority from her husband for t purpose; but, the indorsement being in her own name, was quite impossible to say that she could pass away t interest of her husband by it:" yet it is clear, that, if t husband had given his wife an express authority to indo there would have been no occasion to have recourse t

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to indorse bills of exchange or promissory notes as his agent; and, after the acknowledgments and promises of the defendant in this case, it may reasonably be presumed against him that Mrs. Carter had authority from her husband to indorse the note in question." And, upon its being further objected that the indorsement should have been in the name of the husband, his lordship said: "We may fairly carry the presumption one step further, and presume that the husband authorized her to indorse notes in the name by which she herself passed in the world. The defendant is now estopped from contesting her authority for this indorsement." Lord Ellenborough thus distinctly puts the determination of that case upon an authority that might be presumed. Here, it appears on the record that the wife had an express authority; and therefore the necessity for a presumption that existed in that case does not exist here. *Cotes* v. *Davis* is fortified by the subsequent case of *Prestwick* v. *Marshall*, which appears to me to have been decided upon the principle above adverted to, and not on the ground of any particular statement of agency or authority in the second count of the declaration. The replication here became necessary from the difficulty imposed by the plea. Upon the whole I think there is no departure, and that the plaintiff is entitled to judgment.

Mr. Justice PARK.—I am of opinion that this case falls expressly within the principle laid down in the cases my Lord Chief Justice has observed upon. *Cotes* v. *Davis*, it is true, is but a Nisi Prius case; but it was decided by a very learned and able judge, and its correctness was not disputed at the time. It was very fully considered in *Prestwick* v. *Marshall*, in which I am reported to have said: "In *Cotes* v. *Davis*, the female to whom the note was payable indorsed it in the name by which she was known to the world; and, although it has been said that this case is

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distinguishable, as there was a subsequent promise by the maker to pay the note, and Lord Ellenborough said—'After the acknowledgments and promises of the defendant, it may reasonably be presumed against him that the payee of the note had authority from her husband to indorse it, and further, that he authorized her to indorse notes in the name by which she herself passed in the world;' yet here there was no necessity for such a presumption: and, although there was no subsequent promise by the defendant, yet there was sufficient proof of the previous authority of Mrs. Bickerstaff's husband for her signing and indorsing the bill in question." The only distinction I can perceive between the case of *Cotes* v. *Davis* and the present is, that there the maker promised to pay the note after it became due and after the action was commenced; and there the authority of the wife to indorse rested on presumption, whereas here it was express.

Mr. Justice VAUGHAN.—I am of the same opinion. Although on first looking at the pleadings I was strongly inclined to think that the replication was a departure from the cause of action stated in the count; yet, upon a more attentive investigation, I can perceive no foundation for

cepted it so drawn, he is estopped from disputing the authority; neither could the husband dispute it. *Cotes* v. *Davis* is directly in point. Giving effect therefore to the language of this replication, and to prevent a conflict of decisions, I think the plaintiff is entitled to judgment.

Mr. Justice BOSANQUET.—I am of opinion that this replication may be supported. It was not the object of the new rules to effect any alteration in the mode of declaring, nor in the right of a plaintiff to rebut by replication the defence set up by the plea. If, before the making of those rules, the plaintiff might under the general issue shew that a bill drawn under circumstances like the present, had been so drawn with the authority of the husband, I think he may now put the same matter on the record in the shape of a replication. The simple question seems to me to be this, whether, the plaintiff having declared in the common form on a bill of exchange, and the defendant having pleaded that the drawer at the time of the drawing, acceptance, and indorsement, was a married woman, the former is not entitled to reply that the bill was so drawn and indorsed by the wife with the authority of her husband. It appears to me that he is. *Cotes* v. *Davis* is exactly in point. There is no reason for supposing that the declaration in that case was in any other than the usual form. The case was considered and confirmed by *Prestwick* v. *Marshall:* therefore I consider it as no longer resting on the authority of Lord Ellenborough alone, but as a determination of this court in banc. It is said that the declaration in *Prestwick* v. *Marshall* contained a second count which was free from the objection here taken; and therefore it is suggested that the question of departure could not have arisen there. But I do not find any allusion made to that circumstance: the case seems to have been decided on the principle laid down by Lord Ellenborough in *Cotes* v. *Davis*. Upon the whole I am of

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opinion, that, inasmuch as the fact alleged in this replication might before the new rules have been given in evidence under the general issue, it equally affords an answer to the defence set up in the form of a replication.

Judgment for the plaintiff.

BRAMAH and Another *v.* E. M. ROBERTS, L. ROBERTS, CLARE, BAKER, J. FOSTER, G. H. FOSTER, LYALL, and BLAKSLEY.

Wednesday, Jan. 21st.

In an action on a bill of exchange in the usual form (by indorsees against acceptors), the defendants pleaded that they were defrauded of the bill by a third person in whose hands it had been placed for a special purpose, that the plaintiffs had notice of

ASSUMPSIT on a bill of exchange—indorsees against acceptors. The declaration stated that one W. Clare, on the 22nd October, 1833, made his bill of exchange in writing, and thereby required the defendants to pay to the order of him the said W. Clare 500*l.* three months after the date thereof, which period had now elapsed; and the defendants then accepted the said bill, and the said W. Clare then indorsed the same to the plaintiffs; of all which the defendants then had due notice, and then promised the plaintiffs to pay them the amount thereof according to the tenor and effect thereof, and of their the defendants' said

hat the said T. Hunt should keep and take care of the aid bill for and on behalf of the defendants, and for their se and benefit, and not for the purpose of being negotiat- d or delivered over by him to any other person or per- ons whatsoever; that the said T. Hunt then took and eceived, and, from thence until the plaintiffs became pos- essed of the same as thereinafter mentioned, held the aid bill for the special purpose aforesaid; that the said . Hunt, in violation of good faith, and contrary to the pecial purpose for which he so received and held the said ill as aforesaid, theretofore, and whilst he held and had ne same in his possession for the special purpose afore- aid, to wit, on the day and year last aforesaid, fraudulent- y and without the authority of the defendants, and with ntent to defraud the said defendants in the introductory art of the first plea named, negotiated and parted with he said bill for his own use and benefit, and then delivered he said bill so indorsed as aforesaid to the plaintiffs; that he said bill was not at any time indorsed to the plaintiffs therwise than by the said T. Hunt so delivering the same o indorsed by the said W. Clare as aforesaid, to the plain- iffs; that the plaintiffs, at the time when the said bill was o delivered to them as aforesaid by the said T. Hunt as foresaid, had notice of the premises, and well knew that he said T. Hunt had no power or authority to negotiate r part with the same on his own account; and that there as not at any time any consideration or value given in ood faith for the said indorsement of the said bill of ex- hange to the plaintiffs as in the said declaration mention- d: and this they were ready to verify &c.

Thirdly—That the said bill never was accepted by the efendants except by the said E.M.Roberts, for and on ccount of himself and all the other defendants in this ac- on mentioned, under and by virtue of an authority from he last-mentioned defendants to the said E. M. Roberts accept bills of exchange on behalf of himself and the

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other defendants for particular purposes only, that is to say, for the purposes of discharging claims against certain persons composing a certain company called the South Metropolitan Gas Light and Coke Company, or upon the said E. M. Roberts and the other defendants as directors of the said company; but that the said E. M. Roberts, on the 22nd October, 1833, in breach of good faith, fraudulently and wrongfully, and without the consent or authority of the defendants in the introductory part of the first plea named, and with intent to defraud them, accepted the said bill on behalf of himself and all the other defendants in this action, not on account of any of the purposes for which he was so authorized to accept bills on behalf of himself and the other defendants as aforesaid, but for another and different purpose, to wit, for the private purposes of the defendant W. Clare (who drew the same, and who then had no claim or demand whatever on the other defendants) and of himself the said E. M. Roberts and the defendant L. Roberts; and that the defendants in the introductory part of the first plea named received no consideration or value for the said acceptance: and this they were ready to verify &c.

[redacted]

. M. Roberts was duly authorized to accept the said bill behalf of himself and all the other defendants in this tion; that, after the making of the said bill, and before the had become due and payable, to wit, on the said 4th nuary, 1834, the said bill was indorsed and delivered to e plaintiffs fairly and bonâ fide and for a good and vaable consideration, that is to say, for monies advanced by nd due and owing to them the plaintiffs; and that, at the time when the said bill was so indorsed and delivered to them as aforesaid, they had not nor had either of them notice of the premises in the last-mentioned plea mentioned, nor did they or either of them know for what purposes the said E. M. Roberts was authorized to accept the said bill of exchange, nor for what purpose he accepted the same; and this, &c.

Demurrer to the replication to the second plea; assigning for causes—That the plaintiffs had not in their said last-mentioned replication stated or set forth with sufficient certainty what consideration or value was given by them for the said indorsement of the said bill to them, but had merely stated that the consideration for the said indorsement to them was monies advanced by and due and owing to them, without stating with sufficient certainty when or to whom such monies were advanced, or by whom the same were due and owing, or whether they were advanced at the time when the said bill was indorsed to them, or whether they had been previously advanced and were due before the said bill was indorsed; and that, although the replication was intended as an answer to the second plea, and to support the whole of the plaintiffs' claim to the full amount of the bill, yet it did not aver or state with sufficient certainty that the monies so advanced by and due and owing to them were equal to the amount of the said bill, or entitled them to recover to the full extent of the said bill, which according to the rules of pleading ought to have been shewn, stated, and set forth in the

Demurrer to the replication to the 2nd plea.

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said replication to the said second plea—and that the plaintiffs, who were parties to the indorsement of the said bill, and knew what consideration they gave for the same, ought to have set forth in the said last-mentioned replication with more certainty than they had done the nature and extent of the consideration which they gave for the said indorsement, and when that consideration was given, to have enabled the defendants, who were no parties to the indorsement or to the alleged consideration for the same, to know and ascertain what that consideration (if any) was, and also to have enabled the court to decide, as a point of law, whether such consideration was or was not sufficient to support the plaintiffs' claim to recover the full amount of the bill against the defendants under the circumstances mentioned in the second plea, which was a mixed question of law and fact.

Demurrer to the replication to the 3rd plea.

Demurrer to the replication to the third plea; assigning for causes—That, whereas the last-named defendants had in their said third plea alleged that the said bill never was accepted by the said defendants, except by the said E.M. Roberts for and on account of himself and all the said other defendants in this action under and by virtue of an

himself and the other defendants in this action, had, ntrary to the rules of pleading, denied the said allegans by an argumentative traverse thereof—that the plainfs, if they had intended to raise the question whether or t the said bill was duly accepted by the said E. M. Roerts, ought to have distinctly taken issue upon some one f the facts mentioned in the plea, or alleged that it was ccepted for the purposes for which the said E. M. Roberts as authorized to accept bills as mentioned in the said last plea—that the plaintiffs did not in their replication confine themselves to traversing the last plea in manner above lleged, but also by their said replication proceeded to plead by way of avoidance of the matters alleged in the last plea, by stating and alleging in their said replication thereto, that, after the making of the said bill, and before the same had become due and payable, the said bill was indorsed and delivered to the plaintiffs fairly and bonâ fide and for a good and valuable consideration, and that, when the said bill was so indorsed and delivered to them, they had not nor had either of them notice of the premises mentioned in the said last plea, which premises in fact they actually traversed in the commencement of the replication—that the last-mentioned replication was double and multifarious, and attempted to answer the last plea both by traversing the substantial allegation contained in t, and also by attempting to shew matters in avoidance of the plea if confessed, without confessing it—that the plainiffs did not in their last-mentioned replication state or hew with sufficient certainty when or to whom the monies herein alleged to have been advanced and due and owing o them were advanced, or by whom they were due and wing, or what was the amount of such monies—that the id last-mentioned replication should have concluded to e country, as being a traverse of the last plea, and not th a verification—also that it was uncertain whether the t-mentioned replication was intended as an answer to

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the plea by way of traverse, or of confession and avoidance thereof—and that the replication was in other respects uncertain, informal, and insufficient, and no certain issue could be taken thereon.

Mr. Serjeant *Bompas*, in support of the demurrers.—Prima facie a bill of exchange imports that it has passed for a good consideration; but that presumption is destroyed by a suggestion of fraud. If, before the new rules, the defendant had proved that which is set out on the second plea—viz. that the acceptors were defrauded of the bill by Hunt, in whose hands it had been placed for a special purpose, that the plaintiffs had notice of the fraud, and that they received the bill from Hunt without giving any consideration or value for the indorsement—no doubt that would have constituted a perfectly good defence, unless the plaintiffs, in answer, were able to shew what consideration they actually gave for the bill, and that they had no knowledge of the fraud. In *Heath* v. *Sansom*, 2 B. & Ad. 291, S. being indebted to a firm in which he was a partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees

; and accurately so as to enable the opposite party
tain the truth of it. Whether good consideration or
. mixed question of law and fact; and it must be
ut that the court can see that it is sufficient. Here,
: distinctly alleged what consideration was given,
was given, to whom, or at whose request (*a*); nor
ged from or to whom the debt stated to have form-
of the consideration was due. For anything that
, the indorsement may have been given for a past
ration: and in *Hayes* v. *Warren*, 2 Str. 933, it was
it assumpsit will not lie for a past consideration,
t was at the request of the party. The plaintiffs
und to set it out accurately, and with all the par-
y that would be required in a declaration. Upon
lication the onus would lie on the plaintiffs to prove
y had no notice of the fraud, and that they gave a
nsideration for the indorsement; for, the actual
ation of the fraud stands admitted.
third plea does not allege that the plaintiffs had
f the fraud that was practised upon the defendants
ect to the acceptance of the bill. It would not
essary to prove such notice at the trial, and con-
ly it need not be averred in pleading: there was
it aliunde to call upon the plaintiffs to prove con-
on, on the authority of *Heath* v. *Sansom*. It was
to shew fraud, without going further and shewing
plaintiffs at the time they took the bill received it
tice of the fraud.

Kelly, contrâ.—[The Court relieved him from
d plea, which they held clearly bad.]—It would be
ent to have the question settled, whether where

e Oliverson v. Wood, 3
Roger v. Roger, 2 Vent.
riott v. Lister, 2 Wils.
141. And see Com. Dig. Pleader
(F. 3), (F. 6). 1 Wms. Saund. 264,
note.

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the plaintiff declares in the usual way on a bill of exchange, and the defendant pleads in substance a plea of want of consideration, it is not sufficient for the plaintiff to reply generally that there was a good consideration passing from him. [Mr. Serjeant *Bompas* admitted, that if the plea were confined to a simple allegation of want of consideration, the general replication would suffice.] The forms of pleading do not depend on the course of evidence at the trial. It is no defence to an action by the indorsee of a bill, that the acceptors or any other parties have been defrauded of it: to constitute a valid defence, it must be averred and proved that the plaintiff had notice of the fraud and gave no consideration for the indorsement. It is conceded that the general replication of consideration is a good answer to a plea simply of want of consideration. On what principle, then, where the proof must be the same, should the allegation in the replication be different? whether the necessity of giving proof of the consideration arises from an allegation of fraud or an allegation of want of consideration, in either case the proof is precisely the same. Until the making of the new rules, it was not necessary in any case to shew consideration in pleading in

: particularity and precision: the consideration is be " monies advanced by and due and owing to tiffs." It is objected that the replication does not n or to whom the monies were due. That was ssary: it would be uselessly incumbering the re- h a mere matter of evidence. From whomsoever plaintiff sustains a damage in the suspension of dy for the debt, and that of itself forms a good ation. So, an antecedent debt would be a good ation for the indorsement; and that is averred. : can be contended, that, consistently with what upon the face of the replication, there might have consideration whatever for the indorsement pass- the plaintiffs to Hunt, the indorser, the replica- early sufficient.

erjeant *Bompas* was heard in reply.

Chief Justice TINDAL.—The third plea in this ich is pleaded to an action brought by the in- igainst the acceptors of a bill of exchange, amounts re than this—that the defendants were defrauded ll, and that the acceptance was given without con- n. Now, inasmuch as the indorsees of a bill of e are by law assumed to hold it bonâ fide for va- onsideration, and we are not to presume a notice that would make them fraudulent agents in taking and as this plea is altogether silent upon the sub- ant of consideration and of notice of the fraud een given to the indorsees—the question is whe- mere circumstance of the acceptance having been ntly obtained affords an answer to the claim of an indorsee for valuable consideration and without f the fraud. It appears to me that it does not.
er reliance is placed by the defendants upon the plea, which comprehends those two averments in

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which the third plea is deficient. It does in effect allege that the acceptors were defrauded of the bill by a third person in whose hands it had been placed for a special purpose, that the plaintiffs had notice of the fraud, and that they received the bill without giving any consideration or value for the indorsement. Upon the answer given thereto in the replication, arises the point for our consideration. The replication states, that, after the making of the bill, and before the same had become due and payable, it was indorsed and delivered to the plaintiffs fairly and bonâ fide, and for a good and valuable consideration, that is to say, for monies advanced by and due and owing to them, and that, at the time when the bill was so indorsed and delivered to them, they had no notice of the premises in the plea mentioned. The replication therefore amounts to a denial that the defendants had notice of the alleged fraud, and an assertion that the bill was received by them for a full and valuable consideration. The question is whether they were bound to go further, and shew distinctly what the consideration was which they gave for the indorsement. It appears to me, however, that there is a sufficient consideration affirmatively stated here. The plain-

not say that he was parson at the time of the sever-
et it was held that it should be intended. So, here,
plication is sufficient to shew any person of plain un-
nding that there must have been a money considera-
assing between the parties. That appears to me to
e of the objection. I must confess that I am inclined
urther, and to say, that, if the replication had been
d to a simple denial of the allegation of want of con-
ion and notice in the plea, it would have been suffi-
The case seems to me to bear a strong analogy to
f a plea by an executor of outstanding judgments,
replication that they were kept on foot by fraud and
a). Upon the whole it appears to me, both upon
le and with reference to the particular circum-
of this case, that the replication to the second plea
ed replication, and that the plaintiffs are entitled to
ent.

Justice PARK.—The third plea is clearly bad. With
t to the main point raised upon the replication to
cond plea, it seems to me to be sufficient to reply
lly a good and valuable consideration, without spe-
y setting forth the nature of the consideration. It
to me to be of the greatest importance to the com-
l dealings of the country that too much nicety and
larity should not be required in replications in ac-
pon bills of exchange; for, otherwise, much incon-
ce will result, and the negotiability of such instru-
will be very much restrained. For this reason I am
d to concur with my Lord Chief Justice in thinking
neral allegation of consideration sufficient. But it
necessary to decide that upon the present occasion,
ch as the replication in this case does contain a
nt statement of consideration to a general intent.

(a) See Trethewy v. Auckland, 2 Wms. Saund. 49.

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The defendants in their plea aver that the plai ceived the bill in question without giving any co tion or value for the indorsement. The replicati that it was indorsed and delivered to the plainti and bonâ fide, and for a good and valuable consi that is to say, for monies advanced by and due ar to them. It seems to me that the rules of pleadin require that a replication shall contain all the part of a count. It must surely be understood from t of words here used, that, at the time of the ind of the bill to the plaintiffs, there was a good and consideration for it as between the plaintiffs an dorser.

Mr. Justice VAUGHAN.—I am of the same opin the argument urged on the part of the defendants prevail, the negotiability of bills of exchange would much impeded. With respect to the new rules, it is most important, that, in construing them, the should take care that justice is not entangled in form. The third plea pleaded in the present cas cidedly bad: it merely states that the bill was acce

the particulars of the alleged consideration. My own opinion is that it would have been enough for the plaintiffs to have replied generally that they were holders of the bill for valuable consideration: but the case does not so present itself to us as to render it necessary that we should decide that point. It has been said that it does not appear from the replication that the alleged consideration was not a by-gone debt. If it were so, that would afford no answer, unless where circumstances of suspicion arose before a jury. I think the plaintiffs have averred all that was necessary; and that, whilst it is important that the precise point intended to be presented for the consideration of the court and jury should be raised upon the record, it is of equal importance that the record should not be incumbered with unnecessary allegations.

Mr. Justice BOSANQUET.—I am of the same opinion upon both points. The third plea is clearly insufficient inasmuch as it neither alleges that the bill was received by the plaintiffs without consideration nor that they had notice of the fact of its having been obtained from the defendants by fraud. As to the replication to the second plea, for the reasons already given I am of opinion that it is a good replication. It alleges that the bill was indorsed and delivered to the plaintiffs for a good and valuable consideration; and it goes on to state what that consideration was, viz. monies advanced by and due and owing to the plaintiffs. I am also disposed to concur with the rest of the court in thinking that it is sufficient for a plaintiff under circumstances like the present to aver generally that a good and valuable consideration was given by him for the indorsement, without specifying the nature of the consideration. It is for many reasons important that replications of that description should be upheld if they can be consistently with the rules of law. No forms of replications are given by the new rules, though, in framing them,

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the subject did not escape the attention of the
The proper language of a plea of want of consider
an action by an indorsee against the acceptor, is,
consideration whatsoever was given by the drawe
acceptor for his acceptance of the bill, nor did the
(the indorsee) give to the indorser any consider
the same or for any part of the sum therein me
putting it to the plaintiff to plead affirmatively ir
plication that he did give valuable consideratio
plea now under discussion certainly is not a simpl
want of consideration; it alleges in addition to the
ber of facts tending to shew that the bill had bee
ed from the defendants by fraud. I am of opinic
was sufficient for the plaintiffs to allege generally
replication that the bill was indorsed and delivered
for good and valuable consideration, without alle
nature of the consideration; and that, if it was n
to state the particulars of the consideration, that
sufficiently done in the present case.

Judgment for the pla

:ounted the bill at the request of Hunt, deducted
: amount at the time they so discounted it a debt
lue to them from Hunt; that Hunt had previously
ransaction, although furnished with cheques on
ıpany's bankers, given the plaintiffs cheques on
bankers in payment of debts due to them from
pany; that, although one of those cheques had
shonored, the plaintiffs had never apprised the
nts of the circumstance, but had given time to
nd finally adopted the balance remaining due (57*l.*)
t due to them from Hunt; that the demurrer had
t upon the record under the advice of counsel, and
deponent was advised and believed that the de-
had a good defence upon the merits.

e nisi having been granted, upon payment into
the sum for which the action was brought—

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erjeant *Wilde* now shewed cause, upon an affida-
e plaintiffs' clerk, stating, that the plaintiffs had
'ledge of any fraud having been committed by
hat they (admitting the deduction of the 57*l.* due
nt) had given full value for the bill; and that, Hunt
ome to them a few days before the bill became due,
ther acceptance of the defendants for 1000*l.*, and
d them to discount it and to return him the 500*l.*
r suspicions were excited and they retained the
communicated the circumstance to the company;
Hunt had absconded. It further appeared, that,
ıe delivery of the demurrer, all the facts of the
l been fully disclosed to the defendants in the
' answer to a bill of discovery that the defendants
.—The learned Serjeant submitted that, under
ımstances disclosed by the affidavits, the applica-
ht not to be entertained—it appearing that the
ıtion given by the defendants for the bill was a
l valuable one. He also observed upon the fact

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of there being no affidavit by any of the defendants themselves.

Mr. Serjeant *Bompas*, in support of his rule.—The facts of the plaintiffs having received Hunt's cheques in payment of debts due to them from the company, their having neglected to apprise the company of the dishonour of one of those cheques, and deducting on the discount of the bill the balance of the debt due to them from Hunt on his own private account—were all calculated to induce a suspicion that the transaction was not strictly bonâ fide on their part; and the defendants ought not to be deprived of an opportunity of submitting those facts to the consideration of a jury. The demurrer was not merely on a matter of form; it was essential to the interests of the defendants that the consideration which the plaintiffs had given for the indorsement should have been fully and fairly stated in the replication.

Lord Chief Justice TINDAL.—The practice has ever been, that, if a party thinks fit to rest his defence upon a point of law, he must stand or fall by the point so raised. I do not

hew that they had confidence in the integrity of the transtion, rather than to induce a suspicion of any collusion tween the plaintiffs and Hunt. The subsequent transtion with respect to the 1000*l.* bill affords, in my opin-, further ground for believing the conduct of the plainfs to have been perfectly bonâ fide. I therefore think e rule must be discharged.

Mr. Justice PARK.—I never knew an application of this rt to be acceded to in a case where judgment has been ronounced after argument upon a special demurrer on a atter of mere form: and I speak from an experience of early fifty years.

Mr. Justice VAUGHAN.—The rule as to amendments afer argument is certainly not inflexible: but, in this case, the defendants have not satisfied me that the court ought to exercise its discretion in their favour.

Mr. Justice BOSANQUET.—No doubt the court has power to allow amendments even after argument and judgment. But I concur with the rest of the court in thinking that the present rule ought to be discharged. The demurrer was for a matter of mere form. And I do not think there is anything in the affidavits to impeach the bona fides of the transaction on the part of the plaintiffs.

Rule discharged.

MOORE *v.* STRONG.

Thursday, Jan. 20th.

Evidence of what passed in a conversation between the buyer and seller of goods at the time of the sale, is admissible, notwithstanding it may tend to let in a set-off since barred by the statute of limitations.

DEBT for goods sold and delivered and for money due upon an account stated. Pleas—1. nil debet—2. a set-off

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for goods sold and delivered by the defendant to the plaintiff. Replication, that the set-off was barred by the statute of limitations; whereupon issue was joined. The trial took place before the secondary in London. It appeared that the defendant had in the course of the year 1825, supplied the plaintiff with goods to the amount of 9*l.* 12*s.*; that no further dealings took place between the parties until the year 1830, when the plaintiff, who then carried on the business of a grocer and oil-man, furnished to the defendant the goods for the price of which this action was brought. The particular of the plaintiff's demand commenced with June, 1830, and ended in 1833: the defendant's particular of set-off consisted of five items in October, 1825, and others in November, 1830, and subsequently. On the part of the defendant a witness was called to prove a conversation between the plaintiff and defendant at the time of the sale of the goods in 1830, to the effect that those goods were to be taken by the defendant in satisfaction of the debt then due to him from the plaintiff. It was objected that this conversation was no evidence, inasmuch as it would in effect be letting in parol evidence to bar the statute, which since the 9 Geo. 4, c. 1

statute of limitations, 21 Jac, 1, c. 16, s, 3, of accounts which concern merchandize, that they shall not be limited, extends to accounts *current* between merchants, but not to accounts *stated* between them.

Quære, what amounts to a mutual account within the exception in the 21 Jac. 1, c. 16, s. 3, as to merchants' accounts; and how affected by the 9 Geo. 4, c. 14? and quære whether the exception need be pleaded specially?

Mr. *Humfrey* now shewed cause.—In order to bring mutual accounts within the exception in the statute, the mutuality must exist at the time of the existence of the debt that is sought to be set off. *Catling* v. *Skoulding*, therefore, does not apply; for, here, the debt that the defendant seeks to set off was contracted in 1825, whilst there was no item on the other side of the account until more than five years afterwards. [Lord Chief Justice *Tindal*.—Is it not enough to shew a mutual account, the first item in which on the debit side occurs within six years of the last item on the credit side?] Lord Kenyon, in *Catling* v. *Skoulding*, says: "It is not doubted but that a promise or acknowledgment within six years will take the case out of the statute; and the only question is whether there is not evidence of an acknowledgment in the present case. Here are mutual items of account; and I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute." The ground upon which his lordship puts that case is clearly not tenable since the passing of Lord Tenterden's act, no admission of a debt being now sufficient unless *in writing*. [Lord Chief Justice *Tindal*.—*Catling* v. *Skoulding* proceeded on the ground that merchants' accounts are out of the statute altogether.] In *Cotes* v. *Harris*, Bull. N. P. 149, where the plaintiff, to a plea of the statute of limitations, replied

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a bill of Middlesex, and that the defendant promised to pay within six years before the suing out of the writ, and it appeared that all the items in the bill whereon the demand arose, except the last, were above six years' standing before the bill of Middlesex sued out; it was insisted for the plaintiff that the last item, being within six years, and this being a current account never liquidated, should draw the former items out of the statute; but it was held by Mr. Justice Denison that the clause in the statute of limitations about merchants' accounts extended only to cases where there were *mutual* accounts and *reciprocal* demands between two persons; but, if there were only a demand by A. against B. in the common way of business, as by a tradesman on his customer, that cannot be called merchants' accounts: and he was clearly of opinion that in that case the statute was a bar *to all demands of above six years standing* (*a*). So, in *Cranch* v. *Kirkman*, Peake's N. P. C. 121, which was an action for goods sold and delivered by the testator, to which the defendant pleaded the general issue, and gave a notice of set-off for goods sold and delivered &c. The defendant's set-off consisted of several items for goods sold at different times from 1783 to 1788: the plaintiff's demand accrued chiefly in the year

e put by Mr. Justice Denison in *Cotes* v. *Harris*. At events, if the defendant meant to insist that this is a rchant's account, he ought to have brought his case thin the exception in the statute, by rejoining it spe-ally.

Mr. *Cottingham*, in support of his rule, was stopped by he court.

Lord Chief Justice TINDAL.—It seems to me that this ase may be decided without any reference to the statute f limitations. It appears that the secondary refused to eceive in evidence a conversation that took place between he plaintiff and defendant on the occasion of the sale of ome of the goods in question in the year 1830, because it vas intimated to him that it might have the effect of tak-ng certain items of the defendant's set-off out of the sta-ute of limitations, contrary to the statute 9 Geo. 4, c. 14. It appears to me that the evidence ought to have been re-eived: it might have shewn a contract between the par-ies that these goods should be taken by the defendant in atisfaction of the debt then due to him on account of hose which he had supplied to the plaintiff in the year 1825. What may be the effect of the evidence when re-eived is another question; but it ought to have been ad-nitted: the plaintiff was bound to prove a sale of the oods for a money price.

The rest of the court concurring—

Rule absolute for a new trial (*b*).

(*b*) See Foster v. Hodgson, 19 Ves. 185, Robarts v. Robarts, 1 Moore & Payne, 487, 3 Car. & Payne, 296, Rothery v. Munnings, 1 B. & Ad. 15.

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Where bail have consented that a stay of execution in the action against their principal shall not affect their liability for debt and costs, and, when sued on their recognizance, pleaded a sham plea, and have not come in the first instance, the court will not permit an exoneretur to be entered on the bail-piece on the ground of an alleged variance between the declaration and the affidavit to hold to bail in the original action.

COPPIN and Wife, Administratrix of J. Pleura, Deceased, *v.* POTTER MACQUEEN.

THIS was an action of debt on bond. On the 14th May, 1834, the defendant, having pleaded after two orders for time, withdrew his plea and suffered judgment by default, the plaintiffs consenting to a stay of execution till July: the bail (one of whom was the defendant's attorney) at the same time entered into an undertaking that this delay should not affect their liability to the payment of the debt and costs. An action was afterwards commenced against the bail on their recognizance; the declaration was delivered on the 29th November last, and, on the 5th December, they pleaded nul tiel recognizance.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule calling upon the plaintiffs to shew cause why an exoneretur should not be entered on the bail-piece, on the ground of an alleged variance between the cause of action stated in the affidavit to hold to bail and that upon which the judgment was recovered against the principal, the debt recovered being due to the wife in her represen-

this objection, by the consent which was given by them on the 14th May.

Mr. Serjeant *Wilde* and Mr. *Harrison*, in support of the rule.—Undoubtedly objections to affidavits to hold to bail ought to be taken at the earliest opportunity. But, in the present case, the bail had no right to object to the variance until proceedings were taken against them upon their recognizance. The objection is one of substance.

Lord Chief Justice TINDAL.—It appears to me that the bail have come too late; they ought to have applied as soon as the action was commenced against them. There is also another ground upon which I think we ought not in the exercise of our discretion to listen to this application. I think the bail have concluded themselves by the undertaking given by them on the 14th May. At that time the plaintiffs had declared in the original action, and the undertaking shews that the bail were aware of the form of the declaration. One of the bail, too, is an attorney of the court; he must be presumed to be cognizant of the consequences of giving such an undertaking.

Mr. Justice PARK.—I am of the same opinion. By the consent given on the 14th May, after the declaration in the action had been delivered, the bail admitted their liability up to that time; and, on the 5th December, instead of applying to a judge, they put a sham plea upon the record. Whatever allowance we might have been disposed to make in the case of a lay person, an attorney of the court, who in becoming bail has violated a rule of court, is not entitled to any favour at our hands.

Mr. Justice VAUGHAN.—I think the parties have been guilty of laches, and that they are estopped by their undertaking from urging any objection of this sort.

Rule discharged, with costs.

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The discretion as to costs in actions by executors, given to the court or a judge by the 3 & 4 Will. 4, c. 42, s. 31, is not to be governed by the fact of the action having been properly brought; but it must be shewn that the plaintiff was induced to bring it by something like fraud or misrepresentation on the part of the defendant. [Per Curiam—Mr. Justice Vaughan dissenting.] The mere fact that the defendant when applied to refuses to

SOUTHGATE and Others, Executors of THOMAS CLARK, Deceased, *v.* CROWLEY and Another.

THIS was an action of assumpsit brought by the plaintiffs, as executors of one Thomas Clark, deceased, to recover from the defendants the sum of 917*l.* 18*s.* 10*d.*, being the balance alleged to have been due to Clark at the time of his death for the use of a waggon and three horses hired of him by the defendants from the 1st March, 1827, to the 31st March, 1833; and for a cart and *two* horses hired by them from the 1st January, 1829, to the 31st March, 1833; and also for various charges for cartage done by the deceased for the defendants between the 1st December, 1826, and the 31st March, 1833. Shortly after the death of Clark, which took place in June, 1833, the plaintiffs employed an accountant and also a person named Ballard, who had been clerk to the deceased, to examine his books, in order to ascertain and collect the debts due to his estate; when it was found, that, according to the ordinary and fair scale of charges (no specific sums were charged in the testator's books), the defendants stood

ınts claimed to limit their liability to the lesser sum; and, pon his being asked whether the contract alleged by one the defendants to have been entered into with the testa- r was in writing, he declined to answer the question. efore the commencement of the action, the defendants ndered the 535*l.* At the trial, before Lord Chief Justice 'indal, at the Sittings in London after the last term, the efendants admitted that all the work mentioned in the laintiffs' particular of demand had been performed by 'lark; but they set up an agreement that had been enter- d into by them with Clark, that the cart with *two horses* hould only be charged for as a cart with *one horse:* and there was evidence that this was a common practice in the trade. The jury returned a verdict for the defendants.

Mr. Serjeant *Atcherley*, on the part of the plaintiffs, on a former day in this term, obtained a rule calling upon the defendants to shew cause why they should not, under the statute 3 & 4 Will. 4, c. 42, s. 31, be exempted from liability to pay to the defendants the costs of the suit.—The affidavit upon which the motion was founded, in addition o the facts above disclosed, stated, that the plaintiffs had ıot before the action came on to be tried any knowledge r information as to the grounds of defence intended to be et up by the defendants, except the statement by one of he defendants above set forth; that they had no knowledge of any such agreement as that proved at the trial relative to the cart and two horses; and that, in consequence of the conduct of the defendants and their attorney in concealing from the plaintiffs all knowledge of the nature of the defence intended to be set up by them, they were wholly unable to obtain any information on the subject, and conceived that they could not consistently with their duty as executors abandon their claim to the difference between the sum sought to be recovered by them and the amount tendered by the defendants, when, from the

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best inquiries that could be made on their part, they had every reason to believe that they were legally entitled to recover the full amount of the demand.

Mr. Serjeant *Wilde* was about to shew cause, when the court—observing that the statute has placed executors, in respect to costs, in the same position with others; and that, to entitle them to the exemption sought, something tantamount to fraud or deceit on the part of the defendants must be shewn—called upon .

Mr. Serjeant *Atcherley* and Mr. *Hayes* to support the rule.—The grounds upon which the exemption of executors and administrators from costs stood before the passing of the late statute, were, the want of knowledge on their part of the contracts made by or with the testator or intestate, and the duty which the representative character imposes upon them. In *Hawarth* v. *David*, Cro. Jac. 229, an executor brought debt upon an obligation; a verdict having been found for the defendant upon non est factum, the question was whether the plaintiff was liable to costs under the 4 Jac. 1, c. 3, which enacts, "that, in

overed shall be assets." The new act gives the court discretion to allow the exemption in certain cases, and present is certainly one in which that discretion ought be exercised. The plaintiffs, on reference to the books their testator, found the defendants to stand indebted the estate in a very large sum of money, amounting according to the common course of business to 917*l.* 18*s.* 10*d.* ey were wholly ignorant of any special contract beeen the parties that the work should be done for less an the ordinary charges. The defendants asserted that ere was such a contract, but refused to give the plainffs any information as to the particulars of it. The laintiffs have, therefore, acted with perfect bona fides. Lord Chief Justice *Tindal.*—It may be assumed that the ction was bonâ fide brought; not against the plaintiffs' etter knowledge.] It was the plaintiffs' duty, under the ircumstances, to commence the action. They would have been guilty of a devastavit had they omitted to do so. In *Wilkinson* v. *Edwards*, ante, 173, the court properly refused to excuse the plaintiff from costs, she having commenced the action without using due diligence to ascertain that she could proceed with a reasonable prospect of success, and having been guilty of laches so as to cause unnecessary expense and vexation to the defendant. In the present case, however, no misconduct or laches is imputable to the plaintiffs: they were compelled by the conduct of the defendants to resort to an action.

Lord Chief Justice TINDAL.—The question in this case arises upon the construction of the 31st section of the statute 3 & 4 Will. 4, c. 42, which has made a most mportant alteration in the law of costs as affecting executors and administrators. That clause enacts, "that, in very action brought by any executor or administrator in ight of the testator or intestate, such executor or administrator shall, unless the court in which such action is

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brought, or a judge of any of the superior courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." It appears, therefore, that the general rule now is, that an executor or administrator plaintiff suing unsuccessfully is liable for costs, and that his exemption from such liability is the excepted case; and, like every other excepted case, it must be closely watched, in order to follow up the intention of the legislatnre. It is well known, that, before the passing of the 3 & 4 Will. 4, c. 42, executors or administrators suing in right of their testator or intestate, though unsuccessful, were not liable to costs. I have always understood that that practice obtained, not from any express exception made by the law in their favour, but from the peculiar wording of the statute (23 Hen. 8, c. 15,) which first gave costs to defendants. The 1st section of that statute gave costs to the defendant where the plaintiff was nonsuited or a verdict

tion arose after the death of the testator or intestate. his doctrine seems to be founded on the act of parliament of which all the cases are an exposition, viz. the 23 m. 8, c. 15. Attending to the language of that act rhaps we may be authorised to say that the sound principle on which the exemption of executors and administrators rests, is, not the degree of ignorance under which ey may be supposed to lie, but that the exemption ands itself on the description of the actions contained in e statute by which costs are to be paid." It is perfectly ear, therefore, that the original exemption of executors d administrators from costs was not founded upon their pposed ignorance of the contracts of those they represent, but solely upon the construction of the statutes ferred to. The 3 & 4 Will. 4, c. 42, was intended to medy that which had been found to be a grievance. he rights of both parties ought to be regarded. After verdict for the defendant, he is as much an innocent rty, whether the plaintiff sues in a representative character or not. If the general rule be that Victus victori expensis condemnandus est, why should not an executor aintiff be liable to costs where he fails to establish his ght to sue, in the same manner as if the contract had en made by himself personally? Why should the burden be thrown upon an innocent defendant? One class cases in which the court might properly interpose to lieve executors from costs, is, where they have acted irly and honestly in the assertion of a supposed right, nd have been deceived by some misrepresentation of the ther party. If such had been the case here, I should not have hesitated to say that our discretion ought to be exercised in their favour. But I do not think that is by ny means the fair result of the facts here brought to our nowledge. The action was founded upon a contract etween the testator and the defendants for the hire of a aggon and three horses and a cart and two horses, and

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also on a demand for job work. From the very mode in which the entries were made in the testator's books, blanks being left for the charges, it must have been evident to the plaintiffs that some express contract between the parties existed. If, before commencing the action, the plaintiffs had ascertained from Ballard what they were in a condition to prove in relation to the supposed contract, they would have found that they could only go into court upon a quantum meruit. It seems to me that the action has been brought without that thorough and careful investigation into the circumstances that ought to have been made. I do not attach any blame to the plaintiffs: nor do I say that their conduct has not been perfectly bonâ fide. But the question is, whether there has been anything in the conduct of the defendants that will justify us in depriving them of the benefit the legislature have intended to give them. It is said that they carefully concealed from the plaintiffs the nature of their defence. I should be sorry to say that a defendant who has a defence capable of being made matter of litigation, is bound before he goes into court to disclose it to his adversary on request: I know of no law to compel him to do so. In the present case, it appeared from the evidence that it is by no means im-

with the decision in *Wilkinson* v. *Edwards*: the executrix in that case pursued a vexatious course. It is insisted in the present case that the action has been properly brought, and that it was the duty of the plaintiffs to bring it. Now, although I do not wish to be understood to say that I think the plaintiffs have used due diligence in ascertaining their right to sue, I do not put the case upon the ground of the absence of due caution. That is not the entire question, though the fact of the proceeding being bona fide or otherwise may be a strong ingredient in cases of this description. But the real question is, whether the circumstances of the case are such as to induce the court, in the exercise of a sound judicial discretion, to say that the defendant ought to be deprived of a right which the legislature has contemplated that he should enjoy. I am clearly of opinion that they are not, and that there is no foundation for this motion. It would be a monstrous hardship upon defendants if they were in all cases bound to expose the grounds upon which they intend to defend any claim that may be made upon them.

Mr. Justice VAUGHAN.—Having the misfortune to differ in opinion from my Lord Chief Justice and my brothers, it is satisfactory to me to know that neither party can suffer from my interpretation (however erroneous) of the clause of the statute upon which the question arises. The alteration in that branch of the law which exempted executors from the payment of costs where they failed in prosecuting their suit as plaintiffs, was suggested by the abuses which prevailed in practice, and which proved a temptation to bring speculative actions for which there was no foundation in reason or justice, and which caused great expense and vexation to innocent parties. It was therefore a very salutary restriction to impose, and put them upon the footing of all other plaintiffs (who sue at the peril of paying costs if they do not succeed), unless

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they can satisfy the court, exercising a sound discretion, that the action was properly brought. The very letter and spirit of the act import that cases may arise in which the executor has a just claim to be exempted, although it is impossible to lay down any general rule, or to draw with precision a line by which the judicial discretion of the court may be regulated: each case must depend upon its own peculiar circumstances. Adverting to the facts before us, it appears to me that the executors would have been guilty of a breach of their duty if they had not submitted this question to the opinion of a jury. They find upon the books of their testator an unliquidated demand, amounting, according to the common course of business, to 900*l.* The defendants being called upon for payment, admit that they are liable to the extent of 500*l.* which they are ready to pay; but deny their liability beyond that sum. They are asked by the executors if they have any receipts to discharge the claim, or any matter to urge in reduction of it. They refuse to give any further explanation, and refer the executor to their attorney, who observes a discreet silence. It was insisted that the executor had no right to place the defendants in such a situation; and that

ordinary course of business (a fact within the knowledge of the defendants only), operate powerfully against them. This case will not be a precedent for any other in which the circumstances are not identically the same: but I cannot reconcile my mind to a different construction of the statute, which I think was intended to be used as a shield for the executors where they act bonâ fide, with diligence and caution, and under a conscientious persuasion of the justice of the whole of the demand, induced by a careful examination of the testator's books.

Mr. Justice BOSANQUET.—I concur in opinion with my Lord Chief Justice and my Brother Park. Whatever the ground upon which executors and administrators were formerly exempted from payment of costs—whether it arose from any omission in the statute 23 Hen. 8, c. 15, or from any other cause—I think the 3 & 4 Will. 4, c. 42, s. 31, has now placed them precisely in the same situation with regard to liability to costs where they sue unsuccessfully as other individuals, unless the court shall think fit to interpose in their favour; and the onus of making out a case for this interposition of the court rests on them. It is not enough to shew that the action has been brought bonâ fide: the words of the statute import a *general* liability to costs. Were it otherwise, the statute would have been unnecessary; the law would have been suffered to remain as it was, leaving to the court the power to award costs against the executor or administrator wherever they thought the circumstances of the individual case warranted it. The only ground, as it seems to me, upon which this motion rests, is, the fact that the defendants, when the larger demand was made upon them, refused to state the nature of the agreement upon which they relied for reducing it. But they stated the precise sum which they considered to be due, and afterwards tendered it and paid it into court, and stated generally that they relied

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upon an agreement between Clark and themselves. I can very well understand that the defendants might feel a difficulty in informing the plaintiffs of the exact nature of their defence; particularly as it rested partly on oral testimony and partly on written documents. I cannot say that they acted at all unfairly or unjustly in withholding such information from their opponents. Upon these grounds, the defendants having succeeded, I see no reason why they should not have costs like any other successful defendants.

Rule discharged (*a*).

(*a*) Upon a declaration containing an account stated with the plaintiffs as executors, though it also contains counts on promises to the testator, the defendant is, in case of a nonsuit, entitled to costs *as of course*. The discretion as to costs in actions by executors, given to a judge of any of the superior courts, by the 3 & 4 Will. 4, c. 42, s. 31, extends only to cases in which executors were before that enactment exempt from the payment of costs. Spence v. Albert, 4 Nev. & M. 385. And see Ashton v. Poynter, 1 C. M. & R. 738, where Mr. Baron Parke says that the courts of King's Bench and Exchequer were agreed that Lysons v. Barrow, 10 Bing. 563, 4 M. & Sc. 463, cannot be supported. Spence v. Albert seems to have been decided after consultation with *all* the judges.

e plaintiff's attorney to shew cause why he should not y the defendant those costs, together with the costs of e application.

Mr. Serjeant *Wilde* shewed cause.—He submitted that, he judge having had his attention called to the subject, nd having declined to award costs, it would lead to much convenience and prolixity if an appeal against his discre- on were allowed.

Mr. *Miller*, contrà, observed, that, if the question of sts had been *discussed* at chambers, he would not have plied to the court for them.

Lord Chief Justice TINDAL.—I am of opinion that there no ground whatever for this application. The matter ght to have terminated at chambers. It seems that hen the parties came there, the plaintiff's attorney con- nted to waive the judgment. The object of the sum- ns was therefore attained, and no order was necessary: l, if the defendant's attorney had had a proper sense of interests of his client, there the matter would have ed. It appears from the affidavits on both sides that s were spoken of: the point was to a certain extent ussed; at all events, the judge had his attention called t, and he declined to make an order. It would be ex- nely inconvenient, when so much business is transacted hambers, to hold the order of the judge as to costs not be final. I think this rule ought to be discharged a costs.

Mr. Justice PARK.—When the judgment was waived the plaintiff's attorney, in deference to the opinion I mated, it became unnecessary to make any order; and efused to give costs. The general practice I believe h all the judges, is, to grant costs only under very spe- l circumstances. One of the judges *never* allows them.

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DAVY v. BROWN.

Mr. Justice VAUGHAN.—I think we should be establishing a very mischievous precedent if we did not discharge this rule with costs; we should otherwise be multiplying motions to a most inconvenient extent. I never give costs at chambers but under very particular circumstances.

Rule discharged, with costs (a).

(a) The power of a judge at chambers to give costs was formerly doubted—See Anonymous, 2 Cr. & Jervis, 165, 2 Tyr. 172, 1 Dowl. P. C. 52, Spicer v. Todd, 2 Cr. & Jervis, 165, Read v. Lee, 2 B. & Ad. 415. But it is now settled that he has a discretion on the subject, but one that is to be exercised (as it is said) with considerable caution—Doe d. Prescott v. Roe, 2 M. & Scott, 119, 9 Bing. 104, 1 Dowl. P. C. 274, Hughes v. Brand, 2 Dowl. P. C. 131.

Wednesday, Jan. 28th.

Where one of two defendants is in custody, and the plaintiff is proceeding to outlawry against

DE LANNOY v. BENTON.

MR. Serjeant *Jones* moved for a rule for time to declare against one of two defendants, against the other of whom the plaintiff was proceeding to outlawry.

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› declare against the prisoner until the outlawry or ance of the other defendants (*Sykes* v. *Bauwens*, Rep. 404), and shew that he is using all due dili- in proceeding against them."

Curiam—

Rule granted.

Miller, Demandant, Miller, Tenant.

Wednesday, Jan. 28th.

The rules of Hilary Term, 4 Will. 4, made under the power given to the judges by the 3 & 4 Will. 4, c. 42, s. 1, apply only to cases in which the courts have a common jurisdiction, and therefore embrace neither revenue causes nor real actions.

he 11th section of the statute 11 Geo. 4 & 1 Will.), it is enacted, "that, in all cases relating to the e of any of the courts of King's Bench, Common or Exchequer, *in matters over which the said courts common jurisdiction*, or of or relating to the prac- the court of error before mentioned [the Exche- Chamber], it shall be lawful for the judges of the urts jointly, or any eight or more of them, includ- chiefs of each court, to make general rules and for regulating the proceedings of all the said courts; said rules and orders so made shall be observed in said courts; and no general rule or order respect- h matters shall be made in any manner except as id."

1st section of the 3 & 4 Will. 4, c. 42—after recit- t "it would greatly contribute to the diminishing ense in suits in the superior courts of common law at inster, if the pleadings therein were in some re- altered, and the questions to be tried by the jury s at large than they now are according to the course actice of pleading in several forms of action; but nnot be conveniently done otherwise than by rules ers of the judges of the said courts from time to be made; and doubts may arise as to the power said judges to make such alterations without the

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authority of parliament"—enacts, "that the judges of the said superior courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, shall and may by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when this act shall take effect [June 1, 1833], make such alteration in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations, as to them may seem expedient."

By the 1st section of the rules made in pursuance of the last-mentioned enactment (Hilary Term, 4 Will. 4), it is ordered that "every pleading, as well as the declaration, shall be intituled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial and on the judgment-roll under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge."

[redacted]

question depended solely upon the 3 & 4 Will. 4, c. upon the just interpretation of the 1st section of that te, aided by the recital therein, the power thereby gated to the judges is confined to the regulation of proceedings in those suits in which all the courts have concurrent jurisdiction: and certainly no rules have made in pursuance of that act upon any subject mat- which either of the courts has by law a peculiar diction—nothing relating to criminal cases, or to re- causes, or, eo nomine, to real actions. Looking at recital, it would seem to imply that the suits contem- by the legislature were such as might be instituted either of the courts indifferently. But the question not depend upon that statute alone. The 11 Geo. 4 1 Will. 4, c. 70, s. 11, impowers the judges of the three jointly, or any eight or more of them, to make gen- rules and order for regulating the proceedings of all courts in all cases relating to practice "in matters over the said courts have a common jurisdiction." Then the 3 & 4 Will. 4, c. 42, reciting that doubts may as to the power of the judges without the authority of ament to make alterations in the mode of pleading; and proceeds to enact, in language similar to that used in the er statute, that the judges shall make such alterations to them may seem expedient. It appears to me that these statutes are to be taken in pari materia: I feel no doubt whatever upon the subject.

Mr. Justice PARK.—I am of the same opinion. The power given to the judges to make rules, by the 11 Geo. 4 & 1 Will. 4, c. 70, is expressly confined to matters over which the courts have a common jurisdiction. By the th section, either of the judges of the superior courts is authorized to sit at Nisi Prius for the trial of causes arising in any of the courts, and to transact such business at hambers or elsewhere depending in any of the courts as

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relates to matters over which the courts have a common jurisdiction, and as may according to the course and practice of the court be transacted by a single judge. The provision in the 3 & 4 Will. 4, c. 42, s. 1, was clearly only intended to be co-extensive with those in the former statute.

Mr. Justice VAUGHAN concurred.

Mr. Justice BOSANQUET.—I am of the same opinion. The 3 & 4 Will. 4, c. 42, s. 1, was doubtless intended to refer to the same cases as the 11th section of the former statute, viz. cases in which all the courts have a concurrent jurisdiction.

Rule refused.

Thursday, Jan. 29th.

The 14th rule of Hilary Term, 2 Will. 4, is virtually rescinded

GRANT *v.* GIBBS.

THE defendant in this (a country) cause having been arrested, put in bail within eight days, but did not give notice thereof to the plaintiff's attorney, as required by

be put in and notice given within eight days of the arrest. By a rule of this court made in Easter Term, 49 Geo. 3, it is provided, that, when special bail is put in for the defendant, a notice in writing of such bail being so put in must be forthwith given to the plaintiff's attorney or agent, and that *special bail shall not be considered as put in until such notice shall be given.* The rule of Hilary Term, 2 Will. 4, is rescinded by the statute 2 Will. 4, c. 39, as will clearly appear on reference to the form therein given of the writ of capias, to the third warning directed to be thereunder written or indorsed thereon, and to the 16th section of the act. The statute has substituted a new and different mode of proceeding, giving in all cases the same number of days for the transmission and filing of the bail-piece: and no effect whatever can be given to it unless it be held to over-ride and destroy the rule of Hilary Term, 2 Will. 4. The very point now under discussion was incidentally decided in *Alston* v. *Underhill,* 1 Cr. & M. 492, 2 Dowl. 26, and *Hillary* v. *Rowles,* 5 B. & Ad. 460, 2 Dowl. 201; in the latter of these cases it was held that the statute 2 Will. 4, c. 39, sched. No. 4, has repealed the 24th rule of Hilary Term, 2 Will. 4 (*a*); and therefore, that, if a party held to bail on a capias do not put in special bail within eight days after execution of the process upon him, including the day of such execution, the plaintiff, immediately on the expiration of that time, may put the bail-bond in suit.

Mr. Serjeant *Merewether,* in support of his rule.—The 14th section of the 2 Will. 4, c. 39, impowers and requires the judges from time to time to make all such general rules and orders for the effectual execution of the act as in their judgment shall be deemed necessary or proper. There-

(*a*) Which provided that "no bail-bond taken in London or Middlesex should be put in suit after the expiration of four days, nor, if taken elsewhere, till after the expiration of eight days *exclusive* from the appearance day of the process."

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fore, had it been so intended, the judges would have declared the rule of Hilary Term, 2 Will. 4, to be rescinded: until altered by a subsequent rule, it must still govern the practice. In *Alston* v. *Underhill*, there was no discussion; and *Hillary* v. *Rowles* was a town cause. [The Court seemed to assent to the authority of these cases.]—At all events, to hold that bail is not *put in* until notice is given, will be a very forced construction of the language used by the legislature. [Mr. Justice *Park*.—The rule of Easter Term, 49 Geo. 3, gives the legal construction of the term "putting in" bail.—Lord Chief Justice *Tindal*.—How are we to suppose that the legislature, in speaking of the practice of the courts, has used these words otherwise than as they are understood by the courts (*b*)?]—The learned Serjeant then prayed, that, as the principal point was a very doubtful one, and the party had been misled by a rule of court, the proceedings against the bail might be set aside on payment of costs—the defendant having rendered, and the plaintiff not having declared.

Lord Chief Justice TINDAL.—It appears to me that both the grounds upon which this rule rested have failed. The rule of court upon which the motion is founded was made

warning indorsed thereon: and by that warning notice is given to the defendant, that, if he shall omit to *put in* special bail as required (that is, within *eight days*), the plaintiff may proceed against the sheriff or on the bail-bond. The 16th section of the act further provides that "all such proceedings as are mentioned in any writ, notice, or warning issued under this act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be." Looking therefore to the writ of capias and the warning indorsed thereon, and at the 16th section of the act, it appears that the legislature have very explicitly declared that the time for putting in special bail shall in all cases be *eight days*, without reference to the place where the arrest is made.—The second question is as to what the legislature meant by "*putting in* bail." It appears to me that we must consider that they used those words in the same sense in which the court uses them: and we find, that, by a rule of this court of Easter Term, 49 Geo. 3, it is declared, that, "when special bail is put in for the defendant, a notice in writing of such bail being so put in shall be forthwith given to the plaintiff's attorney or agent, and that special bail shall not be considered as *put in* until such notice shall be given." Such notice not having been given in this case, I think the defendant is not in strictness entitled to set aside the proceedings on the bail-bond. But, inasmuch as it appears that the party has proceeded innocently under a mistake of the law that may well be excused, seeing that the court did not feel free from doubt upon the subject, it seems to me that the justice of the case will be best attained by setting aside the proceedings against the bail, on payment of costs.

Mr. Justice PARK.—I am of the same opinion. This certainly was a matter upon which a party might fairly entertain a doubt. I must own, that, on the first view of

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the case, I was inclined to think that the 14th rule of Hilary Term, 2 Will. 4, was still in force. But, upon consideration, it seems clear that it is controlled by the statute 2 Will. 4, c. 39. I cannot, however, help thinking that it would be wiser to extend the time for putting in bail in country causes: and it may be matter for future consideration whether some rule should not be pronounced upon the subject, in pursuance of the power vested in the judges by the 14th section of the act. But, at present, we can only deal with the law as we find it.—Upon the other point, I concur in thinking that the meaning of the words used by the legislature is governed by the rule of Easter Term, 49 Geo. 3.

Mr. Justice VAUGHAN.—This question is one of importance, but of no difficulty when the statute is looked at. The bill was probably pending in parliament at the time the rules of Hilary Term were pronounced. It is somewhat singular, that, in the schedule containing the form of the writ of capias, there is a direction "to the Mayor and Bailiffs of Berwick upon Tweed;" that seems decisive to shew that the time for putting in bail was advisedly made the same in all cases. As, however, the defendant has

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:PHREY v. WOODHOUSE, GOMME, FISHER, and STILLWELL.

Friday, Jan. 30th.

By the 10 Geo. 4, c. 44, s. 41, where an action is brought against any member of the metropolitan police for anything done in pursuance of that act, and the defendant recovers a verdict, or the plaintiff is nonsuited or discontinues, the defendant is entitled to costs as between attorney and client:—Held, that this provision is not affected by the 3 & 4 Will. 4, c. 42, s. 32; and therefore, that, where such persons are made defendants with others, the judge has no power to certify that there was reasonable cause for making them defendants, in order to deprive them of costs.

' the 8 & 9 Will. 3, c. 11, s. 1, it is enacted, "that, :e several persons shall be made defendants to any m or plaint of trespass, assault, false imprisonment, or :ione firmæ, and any one or more of them shall be upon trial thereof acquitted by verdict, every person or per- so acquitted shall have and recover his costs of suit, ke manner as if a verdict had been given against the ıtiff or plaintiffs, and acquitted all the defendants; ss the judge before whom the cause shall be tried l immediately after the trial thereof, in open court, fy upon the record under his hand that there was a ɔnable cause for the making such person or persons a ndant or defendants to such action or plaint."

y the 41st section of the 10 Geo. 4, c. 44, an act for oving the police in and near the Metropolis, it is "for ɔrotection of persons acting in the execution of the enacted, "that all actions and prosecutions to be nenced against any person for anything done in pur- ce of the act shall be laid and tried in the county e the fact was committed, and shall be commenced n six calendar months after the fact committed, and ɔtherwise: and notice in writing of such action, and of :ause thereof, shall be given to the defendant one ca- ır month at least before the commencement of the ac- and in any such action the defendant may plead the ral issue and give this act and the special matter in :nce at any trial to be had thereupon; and no plaintiff recover in any such action if tender of sufficient ıds shall have been made before such action brought, a sufficient sum of money shall have been paid into t after such action brought, by or on behalf of the ndant; and, if a verdict shall pass for the defendant,

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or the plaintiff shall become nonsuit or discontinue any such action after issue joined, or if upon demurrer or otherwise judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action and of the verdict obtained thereupon."

And by the 3 & 4 Will. 4, c. 42, s. 32, it is enacted, "that, where several persons shall be made defendants in any personal action, and any one or more of them shall have a nolle prosequi entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record under his hand that there was a reasonable cause for making such person a defendant in such action."

Mr. *Busby*, on a former day, obtained a rule calling up- the plaintiff to shew cause why Fisher and Stillwell uld not have their costs notwithstanding the certificate.

Mr. Serjeant *Wilde* and Mr. *Humfrey* shewed cause.— e 10 Geo. 4, c. 44, s. 41, was passed for the purpose of ing to the Metropolitan police the benefit of the 8 & 9 ll. 3, c. 11, s. 1, to a somewhat larger extent, giving them ore perfect protection, viz. costs as between attorney l client, where they are improperly made defendants l would already have been entitled to the benefit of 8 & 9 Will. 3. But it was never intended to con- l the judge's discretion. The language of the 3 & 4 ll. 4, c. 42, s. 32, is general, and applies equally to ma- rates, excise officers, and all other privileged persons. d, although it is essential that the police should be pro- ted in the due and proper performance of their duty, it er could have been intended by the legislature that y should stand in a different situation from the rest of king's subjects where they have so conducted them- 'es as that in the opinion of the judge there was rea- able cause for making them defendants.

Mr. *Busby*, in support of his rule.—By the 10 Geo. 4, 4, s. 41, an absolute and unqualified right to costs is en to an acquitted policeman; a right which the judge by that act no power to take away from him. The stion is whether this right is at all varied either by the 9 Will. 3, c. 11, s. 1, or by the 3 & 4 Will. 4, c. 42, s. Before the statute 8 & 9 Will. 3, c. 11, if one of se- al defendants had been acquitted, he was not entitled his costs; the courts construing the former acts to re- only to the case of a total acquittal of all the defen- its. This being found inconvenient, it was enacted by 1st section of that statute, " that, where several per- s shall be made defendants to any action of trespass,

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assault, false imprisonment, or ejectione firmæ, and any one or more of them shall be upon the trial thereof acquitted by verdict, every person so acquitted shall recover his costs of suit, in like manner as if the verdict had been given against the plaintiff, and acquitted all the defendants; unless the judge before whom the cause is tried shall immediately after the trial thereof in open court certify upon the record under his hand that there was a reasonable cause for making such person a defendant." This statute being confined to the particular actions therein mentioned, the 3 & 4 Will. 4, c. 42, s. 32, was intended to remedy the defect, and to extend the provisions of the former act to every other species of personal action. The act is remedial, giving new rights, but not taking away any that already existed. The 8 & 9 Will. 4, c. 11, s. 1, was only intended to apply to cases where the party was not acting in the performance of any public duty or employment: the 10 Geo. 4, c. 44, s. 41, provides for the protection of persons acting bona fide and with an honest intention to perform a public duty, but mistakenly and unintentionally deviating in a slight degree from the right line of such duty. In the present case, Fisher and Stillwell could only

e moment, I thought the 3 & 4 Will. 4, c. 42, s. 32, being bsequent to the 10 Geo. 4, c. 44, s. 41, did override it, d to a certain extent repeal it. But, as at present adsed, I am of opinion that the only object of the late actment was to apply a remedy to certain defects that re found to exist in the 8 & 9 Will. 3, c. 11, s. 1. Those fects were three—in the first place, the 8 & 9 Will. 3 ly gave the defendant costs in actions of trespass, asult, false imprisonment, and ejectione firmæ; whereas e 32nd section of the 3 & 4 W. 4, c. 42, extends to all rsonal actions—in the next place, the former enactment plied only to the case of an acquittal by verdict; the lat- also embraces the case of a nolle prosequi—again, the actice of the courts, founded upon the 8 & 9 Will. 3, ly allowed the defendant forty shillings costs; whereas 3 & 4 Will. 4 allows him his *reasonable* costs. Inasch, therefore, as the 32nd section of the 3 & 4 Will. 4, 42, seems only to have been intended to apply a remedy the defects in the 8 & 9 Will. 3, c. 11, s. 1, I do not see w it can be held to operate a repeal of the 10 Geo. 4, c. s. 41.

Mr. Justice PARK.—The words of the 3 & 4 Will. 4, c. s. 32, are certainly extremely general; but that clause only intended to operate upon the 1st section of the 9 Will. 3, c. 11, in the way pointed out by my Lord ief Justice. The 10 Geo. 4, c. 44, s. 41, stands upon a y different footing: that act applies to a particular class persons only—persons who are often placed in exnely difficult and dangerous situations, and are there- peculiarly entitled to a legislative protection. By t act, even if the plaintiff had obtained a verdict against se policemen, he would not have been entitled to costs against them unless his lordship had thought fit to cer- his approbation of the action and of the verdict obed thereupon. But, in that part of the clause relating

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to the costs payable to a defendant on acquittal by verdict or otherwise, no mention is made as to any power of the judge to certify. It is of the greatest consequence to the public that the efficiency of the police should not be cramped or destroyed by making them liable to actions upon every slight unintentional excess in the performance of their duty.

Mr. Justice VAUGHAN.—I entirely concur in the construction that has been put upon these enactments. The 3 & 4 Will. 4, c. 42, s. 32, never could have been contemplated as operating a repeal of the 10 Geo. 4, c. 44, s. 41.

Mr. Justice BOSANQUET.—Upon an attentive consideration of the statutes that have been referred to, I am of opinion that the 3 & 4 Will. 4, c. 42, s. 32, was not meant to override or repeal the 10 Geo. 4, c. 44, s. 41. The object of the whole act was to make certain regulations and to amend certain defects in the administration of the law generally; and the particular object of the 32nd section was to remedy the defects in the 8 & 9 Will. 3, c. 11, s. 1. It could not be intended to affect in any degree the provi-

the part of the plaintiff in not proceeding to trial, after notice. The action was case for a malicious arrest and false imprisonment. It appeared that the defendant had caused the plaintiff to be taken before a magistrate for a supposed assault; that the magistrate had dismissed the charge; that a bill of indictment had afterwards been preferred by the defendant at the Sessions for the same assault, which had been found by the grand jury, and removed by certiorari to the court of King's Bench, where it remained for trial; and that the plaintiff had withdrawn the record in this action to await the determination of the King's Bench on the indictment.

Mr. Serjeant *Bompas*, contra, contended, that, under the circumstances, the plaintiff was perfectly justified in putting off the trial, and that he would have acted improperly had he done otherwise.

Mr. Serjeant *Atcherley*, in support of his rule, submitted that the proceeding upon which the action was founded terminated with the dismissal of the charge by the magistrate, and therefore that the pendency of the subsequent indictment afforded no excuse for the plaintiff's default.

Lord Chief Justice TINDAL.—The question here is, whether it would have been reasonable or prudent for the plaintiff to proceed to the trial of the action when the indictment was pending. In answer to a motion of this sort, it is enough if the court be satisfied that there is a reasonable excuse for the plaintiff's delay, and that he has not therein acted wantonly or improperly.

The rest of the court concurring—

Rule discharged, with costs (*a*).

(*a*) See Lee v. Macdonald, 2 Moore & Scott, 140. There, the plaintiff being convicted of felony after issue joined, the notice of trial was countermanded: and the court discharged a rule for judg-

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Saturday, Jan. 31st.

Where money is paid into court under the statute 7 & 8 Geo. 4, c. 71, s. 2, in lieu of special bail, it can only be taken out on putting in and perfecting bail—notwithstanding it has been paid in without prejudice to an application to the court for defects in the affidavit of debt.

GREEN *v.* GLASBROOKE.

THE defendant, on his arrest upon a capias directed to the constable of Dover Castle, paid into the hands of the officer the amount of the debt (240*l.*) and 10*l.* for costs, in lieu of giving a bail-bond. An appearance was afterwards entered by the defendant, and the money paid into court under the 7 & 8 Geo. 4, c. 71, s. 2, without prejudice to an application to the court to set aside the capias for irregularity, on the ground of alleged defects in the affidavit of debt.

Mr. *Mansel*, accordingly, on a former day, obtained a rule calling on the plaintiff to shew cause why the capias should not be set aside, and why the money paid into court should not be paid out to the defendant.

Mr. Serjeant *Wilde* shewed cause.—The motion is too late. The defendant having elected to pay money into court in lieu of putting in and perfecting special bail, and having entered an appearance, he cannot now object to the sufficiency of the affidavit.

s: it imposes upon them no duty; it gives them a fit. It provides that, " in all cases where any defen- shall have been arrested and shall have given bail to heriff, or shall have been arrested and remain in cus-, it shall be lawful for such defendant, instead of put- in and perfecting special bail, to deposit and pay into the sum indorsed upon the writ, together with the ant of the king's fine (if any) upon the original writ, a further sum of 20*l.* as a security for the costs of the n, there to remain to abide the event of the suit; and upon the said defendant may and he is thereby re- ed to enter a common appearance or file common bail e action within such time as he would have been re- ed to have put in and perfected special bail in the n according to the course of the said court." The ndant having elected to avail himself of the right given by the act, he must take it with all its consequences. s to all intents and purposes in the same condition as ould have been in had he put in and perfected special

he rest of the court concurring—

Rule discharged.

TROTTER *v.* BASS.

Saturday, Jan. 24th.

The court or a judge has no power to reduce the amount indorsed upon a writ of summons, so as to make the cause triable by the sheriff.

R. *Sewell*, on a former day, obtained a rule nisi to re- l an order made by Mr. Justice Gaselee to amend the of summons in this case. It appeared that the sum nally indorsed on the writ was 25*l.*: by the order of the ied judge, it was, on the plaintiff's application, reduced *l.*, to the intent that the cause might be tried in the iff's court.

r. Serjeant *Talfourd* was about to shew cause: Sed,

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PER CURIAM.—The jurisdiction of the judge depends upon the indorsement on the writ. It is not competent to him to alter it, so as to make the cause triable before the sheriff.

Rule absolute (a).

(a) See Mills v. Gossett, ante, p. 313.

Friday, Jan. 23rd.

J. S. mortgaged premises to the plaintiff for 8,000*l.*, with a proviso for redemption on payment of the principal on a certain day, and interest half-yearly in the meantime, and also covenanted to pay to certain trustees named in the deed 5*l.* per cent. on so much of the principal as should be from time to time unpaid, by way of a sinking fund towards the liquidation of the principal. For further securing the 8,000*l.*, J. S. gave a warrant of attorney to confess judgment for 16,000*l.*, subject to a defeazance that no execution should issue upon the said judgment until default should be made in payment of the 8,000*l.* or interest, or the annual sum to be paid to the trustees; but that, in case default should be made in any such payment, it should be lawful for the plaintiff at any time from

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THE declaration stated, that, before the making of the memorandum of agreement and promise of the defendant hereinafter mentioned, certain persons, to wit, one G. P.

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Manley and Mary Manley, did by a certain indenture of assignment and mortgage, bearing date the 10th January, 1829, assign to the plaintiff certain messuages, dwelling-houses, hereditaments, slate quarries, and premises (in consideration of the sum of 8,000*l.* then paid by the plaintiff to the said G. P. Manley and Mary Manley), for and during such term of years as was co-extensive with the residue or remainder then unexpired of a certain term of ninety-nine years before then granted to the said G. P. Manley and Mary Manley, and which said indenture was and is subject to a certain proviso or agreement for redemption of all the said premises thereby assigned or intended so to be on payment by the said G. P. Manley and Mary Manley, or either of them, their or either of their executors, administrators, or assigns, unto the plaintiff, his executors, administrators, or assigns, of the sum of 8,000*l.* on the 10th January, 1834, with interest for the same in the meantime after the rate of 5*l.* per cent. per annum, such interest to be paid in even portions half-yearly on the 10th July and the 10th January in every year, and the first payment of such interest to be made on the 10th July then next, in manner as in the said indenture is mentioned; and the said G. P. Manley and Mary Manley did thereby jointly and severally covenant that the said G. P. Manley and Mary Manley, or one of them, their or one of their executors, administrators, or assigns, should and would from and after the 10th January, 1830, pay or cause to be paid unto M. Clayton and A. W. Grant therein mentioned, or the survivor of them, their or his executors, administrators, or assigns, during such time as the same sum of 8,000*l.* or any part thereof should remain unpaid, such annual sum of money as should be after the rate of 5*l.* per per cent. per annum on the same sum of 8,000*l.*, or on so much thereof as should from time to time remain unpaid, by even portions half-yearly, at the respective times

Assignment by way of mortgage.

Proviso for redemption.

Covenant by mortgagees to pay 5*l.* per cent. annually to trustees by way of a sinking fund.

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Warrant of attorney.

appointed by the aforesaid proviso therein contained for payment of interest, to be held upon certain trusts therein expressed and declared, for forming a sinking fund to be applied in or towards the liquidation or reduction of the principal or capital of the said sum of 8,000*l.* at the time and in manner therein mentioned: That, for the further securing the same sum of 8,000*l.*, the said G. P. Manley and Mary Manley executed and as their act and deed delivered to and in favour of the said plaintiff a certain warrant of attorney bearing date the day and year first aforesaid, and thereby (amongst other things) authorized certain attornies therein mentioned, jointly and severally, or any other attorney of the court of King's Bench at Westminster, to appear for the said G. P. Manley and Mary Manley, as of that term, or the term then next, or any other subsequent term, and then and there to receive a declaration for them in an action of debt against them for the sum of 16,000*l.* at the suit of the plaintiff, and thereupon to confess the same action, and also to suffer judgment by nil dicit or otherwise to pass against them in the same action, and to be forthwith entered up against them of record in the same court for the said sum of 16,000*l.*,

entered up by virtue of the above-mentioned warrant of attorney until default should be made in payment of the said sum of 8,000*l.*, or the interest thereof, or the annual sum so covenanted to be paid to the said M. Clayton and A. W. Grant, or the survivor of them, their or his executors, administrators, or assigns, as in the said indenture of assignment and mortgage mentioned, and at the respective times therein mentioned, and in manner therein appointed for payment thereof respectively; but, in case default should be made in any such payment as aforesaid, that it should be lawful for the plaintiff, his executors, administrators, or assigns, at any time, or *from time to time* thereafter, *to issue execution* or cause execution to be issued *upon the said judgment for the whole or any part or parts of the said sum of* 8,000*l.*, and the interest thereof, and all costs, charges, and expenses occasioned by the non-payment thereof, without the necessity of reviving the said judgment, notwithstanding there should have been no prior proceeding thereon, or no proceeding within one year immediately preceding the issuing of such execution: That, before the making of the memorandum of agreement and the said promise of the defendant thereinafter next mentioned, that is to say, in Hilary Term, 9 & 10 Geo. 4, the plaintiff caused judgment to be entered up upon the said warrant of attorney in his Majesty's court of King's Bench at Westminster against the said G. P. Manley and Mary Manley for the said sum of 16,000*l.*, together with his costs of suit, amounting to the further sum of 3*l.* 5*s.*, and afterwards and before the making of the memorandum of agreement and the said promise of the defendant thereinafter mentioned, the said G. P. Manley and Mary Manley made default in the payment of the said annual sums of money so covenanted to be paid by them to the said M. Clayton and A. W. Grant as aforesaid, at the times and after the rate aforesaid; and thereupon the plaintiff, for having execution upon the said judgment against

In case of default, execution to issue *from time to time.*

Judgment entered up.

Default of mortgagees in payment of the annual sum to the trustees.

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Issuing of testatum ca. sa. for 802*l.* 2*s.*

Arrest of the mortgagees thereon.

Defendant's undertaking, in consideration of their discharge, that mortgagees should be forthcoming to meet another execu-

the said G. P. Manley and Mary Manley for a certain sum of money, to wit, the sum of 802*l.* 2*s.*, afterwards and before the making of the memorandum of agreement and the said promise of the defendant thereinafter mentioned, sued and prosecuted out of the court of our sovereign lord the now king before the king himself a certain writ of our said lord the king, called a testatum ca. sa. founded on the said judgment so entered up under and by virtue of the said warrant of attorney as aforesaid against the said G. P. Manley and Mary Manley, directed to the sheriff of the city of Bristol; by virtue of which said writ the sheriff of the city of Bristol took and arrested the said G. P. Manley and Mary Manley, and kept and detained them in custody until and at and after the time of the making of the memorandum of agreement and the said promise of the defendant thereinafter mentioned; of all which the defendant afterwards and before the making of the memorandum of agreement and the said promise of the defendant thereinafter mentioned, had notice: and thereupon, in consideration of the premises, heretofore, to wit, on the 13th November, 1833, by a certain memorandum of agreement in writing then made between the plaintiff and the defendant, and then signed by the defendant, it was

be to effect a sale of the mortgaged property; and the defendant also agreed that the said G. P. Manley and Mary Manley should pay or be charged with all proper costs and charges to be incurred by the sheriff of Devonshire and the plaintiff relative to the execution issued against them in the month of March then last: And, the said agreement being so made as aforesaid, to wit, on the day and year aforesaid, in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then promised the defendant to perform and fulfil the said agreement in all things on the plaintiff's part and behalf to be performed and fulfilled, he the defendant promised the plaintiff to perform and fulfil the said agreement in all things on the defendant's part and behalf to be performed and fulfilled: And the plaintiff in fact said, that, although, after the making of the said agreement, to wit, on the day and year aforesaid, he, confiding in the said promise of the defendant, and in hopes of his faithful performance thereof, did suffer and permit the said G. P. Manley and Mary Manley to be discharged out of the custody of the said sheriff, and the said G. P. Manley and Mary Manley were then discharged out of the said custody accordingly; and, although it afterwards and before the commencement of this suit, and within the space of twelve months from the time of the making of the said memorandum of agreement and the said promise of the defendant, appeared to the plaintiff to be necessary to issue another execution against the said G. P. Manley and Mary Manley; and although the plaintiff did within such time as aforesaid, and after the 10th January, 1834, and before the commencement of this suit, issue another execution against the said G. P. Manley and Mary Manley upon the said judgment so entered up as aforesaid, for a large sum of money, to wit, the sum of 7215*l.* 9*s.* 1*d.*, then remaining due from the said G. P. Manley and Mary Manley to the plaintiff upon the said indenture of mort-

Averment that mortgagees were discharged from custody:

That a second execution issued against them, for 7215*l.* 9*s.* 1*d.*

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Notice to the defendant.

gage; whereof the defendant afterwards and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice: nevertheless the defendant, not regarding the said memorandum of agreement or his said promise, did not at any time after the said last-mentioned execution against the said G. P. Manley and Mary Manley was issued, cause or procure the said G. P. Manley and Mary Manley or either of them to be forthcoming,

Defendant's default.

but had hitherto wholly neglected and refused so to do; and by reason thereof the plaintiff had been hindered and prevented from enforcing his said last-mentioned execution against the said G. P. Manley and Mary Manley or

Damage.

either of them, and was likely to lose the said sum of money so remaining due to him from the said G. P. Manley and Mary Manley as last aforesaid upon the said indenture of mortgage, and all means of enforcing payment of the same.

Plea.

The defendant pleaded, that, at the time of the suing and prosecuting of the said writ of testatum ca. sa., and also at the time of the arresting of the said G. P. Manley and Mary Manley by virtue of the same writ, and also at the time of the making of the supposed agreement and proviso as in the declaration was mentioned, the said sum of

f the said annual payments so by the said indenture nted to be made as in the said declaration was men- was due and payable from the said G. P. Manley ary Manley to the plaintiff: and this &c.
urrer and joinder.

James Manning, in support of the demurrer.—The tion discloses an agreement that is void in law, and hich no action is maintainable. The Manleys hav- n once taken in execution and discharged, the judg- as satisfied in law; consequently the undertaking of endant, that they should be forthcoming at a future in case it should appear to the plaintiff to be neces- issue another execution against them, was perfectly ry. A defendant cannot be taken in execution twice ame judgment, if he be discharged the first time by the f's consent, though upon an express undertaking that ld be liable to be taken in execution again if he failed ply with the tems agreed on—*Blackburn* v. *Stupart*, , 243. Mr. Justice Grose there said: "It would dangerous to permit the law to be unsettled in this , which is, that a person cannot be taken in execu- ice on the same judgment, *whether he had so agreed* and therefore, though the defendant's conduct has ery scandalous, yet the rule must be made absolute." *Vigers* v. *Aldrich*, 4 Burr, 2482, where, to debt on nent, the defendant pleaded that he had been taken a ca. sa., and afterwards discharged out of custody sent of the plaintiff, upon an agreement to pay cer- ms at stipulated times; the court, upon demur- ld that the plaintiff could not bring an action on the nt after the defendant had been taken in execution charged by the plaintiff's own consent. In *Jaques by*, 1 Term Rep. 557, Mr. Justice Ashhurst says: w of only one case where a debtor in execution, s obtained his liberty, may afterwards be taken

Hague, 7 T. R. 420, that, if a plaintiff consent to
fendant's being discharged out of execution on his
taking to pay at a future day, he cannot afterwa
out any execution on that judgment, in the event
defendant's not fulfilling his undertaking. So, i
lam v. *Price*, 2 Moore, 235, where the plaintiff obt
verdict in trespass against two defendants, and bo
arrested on a joint ca. sa. for the amount of the da
and one was discharged on giving to the plaintiff
missory note payable by instalments, it was he
this operated as a discharge to the other. In *Wl*
v. *Hamkinson*, Cro. Car. 75, in debt upon an obli
the defendant pleaded that one J. W. was bound w
jointly and severally in the bond, and that the plai
covered against *him*, and had him in execution up
sa., and that such sheriff libere et voluntarie pe
him to go at large. On demurrer, judgment was gi
the plaintiff—" for, an execution against one is no
that he may sue the other; for, execution without s
tion is not any bar: and, although he escaped by
luntary permission of the sheriff, as is pleaded, so
plaintiff is entitled to an action against the sheriff,
shall not deprive him of his remedy against the other
but, if he had pleaded that the sheriff suffered him
at large *by the license or command of the plaintiff*,
been a discharge, and might have been pleaded i

E. May should pay 730*l.* on or before the 10th January, 8, or that in case of default E. May should be render- n that day at a certain place, so that he might be n taken in execution: and the court, on the authority of rs v. *Aldrich*, held that the latter part of the condition void, being to render a prisoner in execution who had been discharged. *Walker* v. *Alder*, Style, 117, and e v. *Goodrick*, Style, 387, are to the same effect. d Chief Justice *Tindal.*—The general position will I presume, be denied by the plaintiff.] The agree- entered into between the parties in this case cannot rmitted to supersede the general rule of law that a ment is satisfied when the defendant is once taken in ction upon it. [Lord Chief Justice *Tindal.*—What u say to cases on the 8 & 9 Will. 3, c. 11, of debts y instalments?] In those cases the plaintiff is ex- ly authorized by the statute to issue execution from to time. But, even in such a case, if the defendant, in execution for an instalment, were discharged out stody *by the consent of the plaintiff*, the whole judg- t, or at least the instalment for which the party had in execution, would in law be satisfied. Here, the neys were taken in execution upon the judgment: it s not appear from the declaration what was the sum ted in the writ; but the court will assume that the sher- was commanded to take them to satisfy the 1600*3l.* 5*s.*, e amount of the judgment. [Lord Chief Justice *Tindal.* If we are to assume anything, are we not to assume that e writ was issued for the sum mentioned in the defea- nce of the warrant of attorney?]

Although the declaration avers generally that the de- ndant had notice of the issuing of the second ca. sa., it is t averred that he had notice of the county into which h second writ issued. [Lord Chief Justice *Tindal.*— at can only be ground for a special demurrer. The fendant undertakes to perform a duty. Unless on spe-

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cial demurrer, we must assume that he had a sufficient notice to enable him to perform that duty.] Upon a demurrer to the replication, it is open to the defendant to urge any objection that would avail in arrest of judgment. Undoubtedly, if issue had been taken on this allegation, and the plaintiff obtained a verdict, the objection would be cured by the verdict; the notice would then be presumed to have been sufficient: but it is otherwise on demurrer. [This point was abandoned.]

The intention of the parties on entering into this agreement must have been that the Manleys should be forthcoming to answer the same sum for which they were then in execution, viz. 802*l.* 2*s.* The second execution is for 7,215*l.* 9*s.* 1*d.* For any thing that appears, the former sum is included in the latter.

The replication affords no answer to the plea. The latter states that at the time the first execution issued and the Manleys were taken in execution under it, and at the time of making the agreement, 8,000*l.* was not, nor was any part thereof, nor was any interest upon the same, or upon any part thereof, due or payable from the Manleys to the plaintiff, nor had any costs been incurred by the nonpay-

when the terms have not been complied with—*Puckford* v. *Maxwell*, 6 T. R. 52 (*a*). In *Vigers* v. *Aldrich*, *Jaques* v. *Withy* and *Tanner* v. *Hague*, the circumstance of the party having consented to the discharge subject to the condition of his not setting up such discharge in answer to a second execution, is wanting. *Blackburn* v. *Stupart* is undoubtedly an authority strongly in favour of the defendant's argument. But, taking these and all the other cases cited to have been correctly decided (and they are too well recognized for this court to overturn them), they do not authorize a judgment for the defendant in this case: in all of them, the party was in execution for the whole amount of the judgment; the object of the execution was to obtain the entire satisfaction of the judgment; and the defendant had done nothing to warrant the plaintiff in suing out execution for different parts of it. Nothing, however, is more common than for a judgment to be taken as a security for payments by instalments: and questions are constantly arising as to whether one default gives the plaintiff a right to sue out execution for the whole. The practice is, to issue the execution for the whole sum, and to levy for each particular default. No suggestion of breaches under the statute 8 & 9 Will. 3, c. 11, is necessary on a judgment by warrant of attorney—*Kinnersley v. Mussen*, 5 Taunt, 264; even though a bond also is given—*Austerbury* v. *Morgan*, 2 Taunt. 195: nor upon a warrant of attorney conditioned for payment by instalments—*Cox* v. *Rodbard*, 3 Taunt. 74 (*b*). In *Leveridge* v. *Forty*, 1

(*a*) But see *Wilson* v. *Hamer*, 1 M. & Scott, 120, 8 Bing. 54, 1 Dowl. 248, where it was held that a party discharged from arrest on giving a security, cannot be arrested again if the security turn out to be worthless, unless he has been guilty of fraud.

(*b*) Where a defendant gives a warrant of attorney to secure the payment of a sum of money by instalments, and default is made, he may be charged in execution for each of those defaults as they are made. *Davis* v. *Gompertz*, 2 Dowl. 407, 2 Nev. & Man. 607. On

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M. & Sel. 706, where the defendants gave a warrant of attorney to secure a sum certain to be paid by half-yearly instalments, with interest, on specified days, and it was stipulated that the plaintiff should be at liberty to enter up judgment thereon immediately, but no execution to be issued till default made in payment of the said sum, with interest, as aforesaid, by the instalments and in the manner before mentioned—it was held that the plaintiff might take out execution for the whole on default in payment of the first instalment. Mr. Justice Bayley there recognizes the right of parties to stipulate for successive executions. He says: "The probable intention of the parties was, that, if any default was made, the plaintiff should be at liberty to levy the whole. There is not any provision for levying from time to time as default should be made." *Tilby* v. *Best*, 16 East, 163, is also an authority in support of the same position. These cases are abundantly sufficient to shew that the agreement of the parties in this case, that successive executions should issue for different parts of the same debt, was valid.—The validity of the consideration for the defendant's promise cannot, however, as the record now stands be called in question. If it could, the cases of

very fully considered in *Foster* v. *Jackson*, Hob. 52, and thus laid down by Lord Hobart: "If upon a fi. fa. the debt be satisfied in part, the rest may be served [levied] either by capias or elegit. But, if a capias be executed, that is in law sufficient for the whole debt; for, corpus humanum non recipit estimationem, so as if you take it [at] all you must take it for the whole debt. I agree clearly that it [the capias] is not an actual satisfaction, no not between the parties, according to *Hillarie's* case, 33 Hen. 6, 47. But, the question is whether it be not quasi satisfaction, or satisfaction in law, to that very suit. I hold that a capias ad satisfaciendum is against the party is not only an execution, but a full satisfaction by force and act and judgment of law; so as against him he can have no other, nor against his heir or executor, for these make but one person in law. For, where the law gives three or four kinds of executions, not altogether, but by way of choice, whereof the ca. sa. is one, and when the body is taken it is a full execution, and cannot be for part (as a fi. fa. may be); it is an election of itself of that kind of execution, and so a renouncing of the rest as well as an elegit, though it use not the very word &c.: for, if the defendant had lands and goods when the plaintiff took the body, he made a plain preferment of that execution before the other: and, if they came after, he prevented his choice by haste, which expedition alone is a great advantage in execution. And it is especially to be noted that the debtor hath not the choice to put the creditor upon the execution; for, then it had some colour of reason: but the choice is taken by the creditor." And see *Linacre's* case, 1 Leon. 230. Thus, it appears, that, before the statute 21 Jac. 1, c. 24 (*a*), if a debtor died in execution, his personal representatives were no further chargeable. It is not now contended that there was no sufficient consi-

(*a*) See White v. Heyward, 1 Dick. 175.

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deration for the defendant's promise; but that the undertaking was to do an act which is in itself illegal, and consequently the promise is void. Neither is it contended that successive executions may not by the express agreement of the parties issue for different parts of the same judgment: but that such succeeding executions cannot be by ca. sa.; they must either be by fi. fa. or by elegit, and even then not after the debtor has been in execution under a ca. sa., and discharged. By the 1st section of the statute 41 Geo. 3, c. 64 (U. K.), (which was only in force for three years), it was provided that any creditor at whose suit a debtor was charged in execution, might consent to his discharge, without losing the benefit of the judgment upon which the execution issued, except that the person of the debtor should not be again liable to arrest for the same debt, nor the bail be proceeded against—clearly recognizing the law to be as laid down by Lord Chief Justice Hobart.

Lord Chief Justice TINDAL.—The question in this case arises upon a demurrer to the replication: but, as we are of opinion that the plea is bad in law, it becomes unnecessary for us to advert to the objection that has been made

ing of the writ of testatum ca. sa., and also at the time of the taking and arresting the Manleys by virtue of the same writ, and also at the time of the making of the supposed agreement and promise as in the declaration mentioned, the sum therein mentioned was not, nor was any part thereof, nor was any interest upon the same or upon any part thereof, due or payable from the Manleys to the plaintiff. It appears to me, however, that, by the agreement he has entered into, the defendant admits that the Manleys were really in execution at the time, and that the validity of that execution cannot now come in dispute. The defendant, having obtained for the Manleys all the benefit he contemplated when he gave the undertaking, is estopped from setting up the want of consideration for the issuing of the writ, which upon the face of it appears to be valid.

It is then contended, on the part of the defendant, that the declaration is bad, inasmuch as it discloses an agreement void in point of law. If that be so, undoubtedly there is an end of the action. But, looking at the declaration and the agreement therein set forth, and having attentively heard the argument urged on the part of the defendant, I cannot arrive at that conclusion. The declaration states, that, on the 10th January, 1829, the Manleys mortgaged certain premises to the plaintiff for 8,000*l.*, with proviso for redemption on payment of the principal on the 10th January, 1834, and interest half-yearly in the meantime—the Manleys covenanting to pay the plaintiff interest half-yearly at 5*l.* per cent. per annum, and also to pay to certain trustees, during such time as the 8,000*l.*, or any part thereof, should remain unpaid, 5*l.* per cent. per annum, half-yearly, by way of a sinking fund, towards the liquidation of the principal. It was thought fit that the principal sum and interest, and also the annual payments to the trustees, should be further secured by a warrant of attorney to confess judgment for 16,000*l.*, subject to a defeazance that

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no execution should issue thereon until default should be made in payment of the principal sum or interest, or the annual sum to be paid to the trustees; but that, in case default should be made in any such payment as aforesaid, it should be lawful for the plaintiff at any time, *from time to time*, to issue execution upon the said judgment for the whole or any part or parts of the said sum of 8,000*l.* and interest, &c. This therefore was an express understanding between the parties that different executions should from time to time issue against the Manleys until the whole sum due for principal and interest should have been received by the plaintiff. The declaration then goes on to state, that, before the making of the defendant's promise, default was made in the payment of the annual sum covenanted to be paid to the trustees; and that thereupon the plaintiff, for having execution upon the said judgment against the Manleys for a certain sum of money, to wit, the sum of 802*l.* 2*s.*, sued out a writ of testatum ca. sa. founded on the said judgment so entered up as aforesaid against the Manleys; and that they were thereupon arrested. Such being the position of the parties, it was agreed between the plaintiff and defendant, that, upon

Manleys were not forthcoming, &c. Upon this state of facts, it is contended on the part of the defendant that this agreement was void in law, inasmuch as it amounts to an agreement that the Manleys should be subjected to a second arrest for the same debt. Admitting for the purpose of argument, that, where a party is in custody for an entire debt, an agreement by a third person, that, in consideration of his discharge from such custody, he shall be forthcoming to answer a second execution for the same debt, such agreement would be illegal, still the present case does not either in law or in fact fall within that principle. The second execution does not appear to have been for the same sum as the first. On the contrary, pursuing the calculation suggested by the mortgage deed, it appears that the second execution was substantially for a different sum and a different subject matter altogether. At all events, it should not have been left in doubt by the defendant whether it was for the same debt or not: it is enough that it does not appear to us that the objection arises upon this record. But, supposing that the second execution was issued for the same sum as the first, or that it included it, the defendant has given no answer to the cases cited on the part of the plaintiff, to shew, that, where the parties have agreed that successive executions shall issue for different parts of an entire debt, such executions will be upheld by the court—*Tilby* v. *Best*, *Leveridge* v. *Forty*, *Austerbury* v. *Morgan*, *Cox* v. *Rodbard:* and indeed the good sense of the principle would suffice to establish it without the aid of authority. If the writ were void in law, the sheriff would be liable to an action for a false arrest. The universal practice, however, has been, as in all the cases cited by the counsel for the defendant, to apply to the court to discharge the party from the second execution. If, therefore, a second arrest or execution is not ipso facto void, even where there is no agreement of the parties to warrant it, à fortiori it is not void

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where there is such an agreement. I am of opinion that the declaration discloses a sufficient consideration for the defendant's undertaking, and that there is nothing illegal in it; and consequently that the whole is a question of damages for a jury.

Mr. Justice PARK.—My Lord Chief Justice having gone so fully into the case, it will be unnecessary for me to state my opinion at any length. I fully concur in the judgment his lordship has pronounced. Mr. Justice Ashhurst, in *Jaques* v. *Withy*, laid down the law as Mr. Manning has stated it to-day: but Mr. Justice Buller did not agree with him. There are many cases to be found in the books where the courts have refused to interfere, as, for instance, where there has been anything like fraud practised on the part of the defendant. Thus, in *Baker* v. *Ridgway*, 9 B. Moore, 114, 2 Bing. 48, the defendant was taken in execution under a ca. sa. on a judgment obtained by the plaintiffs, and a commission of bankrupt was afterwards issued against him whilst he remained in custody at their suit, and the plaintiffs being compelled, in order to prove their debt, under the statute 49 Geo. 3,

l have been compelled to do by affidavit if this had an application to the court to discharge the party the second execution. Inasmuch, however, as the ıdant has not done this, and has failed to satisfy the s of the court that there is anything illegal in the ement upon which the action is brought, the plaintiff itled to judgment.

r. Justice VAUGHAN.—It does not appear to me to be ısary to discuss the authorities referred to, of *Tanner ague*, *Vigers* v. *Aldrich*, *Blackburn* v. *Stupart*, and *es* v. *Withy:* they all apply to a state of facts differ- rom the present—the party here not having, as far as an see, been taken a second time for the same debt. question now before us turns upon the agreement of arties. In ease of the debtors, it was stipulated that ebt should be paid by instalments, and that successive utions might issue for the levying of those instalments. nothing illegal in such a stipulation, either by the ors themselves or by a third party. The strongest ence arises from the whole record, taken together, the second execution issued for a debt totally different distinct from the first.

r. Justice BOSANQUET.—I am of the same opinion. principal question arises upon the declaration and the ed exemption of the Manleys from a second execu- *Da Costa* v. *Davis* proceeded on the ground that lefendant was not liable to be taken on the second ıtion. Here, the Manleys were so liable. The ground which I hold the second execution in this case to be , is, that it does not appear from the record that it is- for the same debt as the first: the first was for 2*s.*, the second for 7,215*l.* 9*s.* 1*d.;* and it no where ars that the former sum or any part of it was included e latter: and I think it was incumbent on the defen- to shew it if it were so, the legal presumption being

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that the two debts were different. Under the circumstances, therefore, there clearly is no ground for holding that the Manleys were not liable to a second execution.

Judgment for the plaintiff.

Wednesday, May 13th.

Where the defendant, after argument and judgment on demurrer, obtained an order of a judge at chambers, who was not present at the argument, to amend his plea, though the amendment was one which the court would have permitted had the application been made to them, a rule for discharging the judge's order was only discharged on the terms of the defendant paying

After judgment had been pronounced as above, viz. on the 29th January, the plaintiff having delivered to the defendant a statement of the several sums received by him on account of the mortgage, the latter thereby discovered that the sum for which the second execution had issued against the Manleys did in fact include the 802*l.* 2*s.* for which they had before been taken in execution. On application to Mr. Justice *Gaselee* at chambers, upon an affidavit stating the fact, that learned judge made an order to enable the defendant to amend his plea by adding thereto an allegation to that effect.

Sir *W. Follett*, on the part of the plaintiff, obtained a rule calling upon the defendant to shew cause why the order should not be discharged, on the grounds that the application had been made too late, and that the amend

says: "It is true that the order is made by a judge at chambers; but still it is to be regarded as the order of the court. The effect of these orders was much considered in the case of *The King* v. *Wilkes*, 4 Burr. 2570. They are as binding as any act of the court, though they are not entered and made rules of court unless it be necessary to enforce them by attachment." No case can be more proper than the present for the exercise of the discretionary jurisdiction of a judge at chambers.

Sir *W. Follett*, in support of his rule.—This is not a case under the new rules: it is a case where the defendant seeks to amend after argument and after the court have pronounced judgment, expressing a strong opinion upon the very point that the defendant by his amended plea seeks to agitate again. The learned judge who made the order was not in court when the demurrer was argued and determined; and, in all probability, had he known what passed on that occasion, he would not have allowed the amendment. The application should at all events have been made to the court.

Lord Chief Justice TINDAL.—Doubtless, the proper course has not been taken by the defendant in this case: the application for leave to amend should regularly have been made to the court at the time of argument. The only question, however, for us now to consider, is, whether, the knowledge of the fact that has been allowed by the learned judge to be put upon the record having come to the defendant after argument and judgment, we ourselves should not have granted the amendment if the motion had been made before us in due course. On the former occasion, we did not pronounce a *judgment* upon the precise point that the plea in its present state raises. I think, under all the circumstances, that the rule must be discharged, but that the costs of the rule, as well as of the application to amend, should be borne by the defendant.

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Mr. Justice GASELEE and Mr. Justice VAUGHAN concurred.

Mr. Justice BOSANQUET.—The courts do sometimes allow amendments after argument and even after judgment, under particular circumstances. In the present case, it appearing that the amendment is one that the court would have permitted had the motion been made to them, I see no objection to the order of my Brother Gaselee. But, at the same time, I must say that I very much disapprove of the course the defendant has pursued. Instead of coming before the court, he very improperly applies to the judge who was not present when the case came on for argument.

Rule discharged accordingly (a).

(a) See Laythoarp v. Bryant, ante, p. 338, Bramah v. Roberts, ante, p. 364.

Saturday,

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the time of making the act of parliament thereinafter ntioned, and affixing the notice on the church door of parish church of the parish of Bepton under and by tue of that act, as thereinafter mentioned, and from ence until and at the time when &c. in the declaration ntioned, he was the occupier of a certain cottage and vers, to wit three, acres of land, with the appurtenances, uate and being in the parish aforesaid; that he and all ose who before him had successively occupied the said ttage and land with the appurtenances, for and during e full period of thirty years next before the time of af-xing such notice in writing as thereinafter mentioned, as ch occupiers, without interruption, and claiming right ereto, had, used, and actually enjoyed, and had been customed to have, use, and enjoy, and of right ought to ve had, used, and enjoyed, and the defendant, as such upier of the said cottage and land with the appurte-ces as aforesaid, at the time of affixing the said no-e in writing as thereinafter mentioned, ought to have d, used, and enjoyed, for himself and themselves respec-ely so occupying as aforesaid, common of pasture in, on, and throughout the said close in which &c. for all and their commonable cattle levant and couchant in d upon the said cottage and land with the appurte-nces, every year, at all times of the year, as to the said ttage and land with the appurtenances belonging and pertaining; that, the defendant so being such occupier the said cottage and land with the appurtenances, and entitled to such right of common as aforesaid, by a cer-in act of parliament made before the said time when &c., at is to say, at the parliament of our lord the now king, a session thereof holden at Westminster in the third ar of his reign, intituled 'An Act for inclosing lands in e parish of Bepton, in the county of Sussex,' it was mongst other things) enacted that it should be lawful r a certain commissioner in the said act named, and he

Avowant's right of common in B. common.

Inclosure act, 3 & 4 Will. 4, c. 40.

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Commissioner authorized by award to direct rights of common in B. common to be extinguished or suspended.

was thereby authorized, at any time or times before the execution of his award as in the said act mentioned, by notice in writing under his hand, to be affixed on the principal outer door of the parish church of Bepton, on some Sunday, previous to divine service, to order and direct all or any part of the rights of common in, over, or upon the said common called Bepton common, and the wastes and waste lands contiguous or belonging thereto, or any part thereof, to be extinguished, or the exercise thereof to be suspended for and during such time as should be expressed in such writing; and that all such rights of common as the said commissioner should by such writing order and direct to be extinguished, or the exercise thereof to be suspended as aforesaid, should, from the time of affixing such writing on the said church door, cease, determine, and be extinguished, or the exercise thereof be suspended accordingly, any law, usage, or custom to the contrary notwithstanding; that if, during such suspension, or after such extinguishment of such rights of common or other rights as aforesaid, any of the said proprietors or occupiers or claimants of pasturage and common rights there, or any other person or persons whomsoever, should

Cattle &c. depasturing on B. common after such extinguishment or suspension, to be distrained,

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uld not be paid within five days after such impound- the said justice was thereby authorized and impower- upon proof of such offence or offences having been nitted, and non-payment of the penalty or penalties in- d, to cause the cattle or sheep so distrained, or such of as he should think fit, to be sold for raising and pay- e penalty or penalties incurred as aforesaid, together the costs and charges attending every such distress le, rendering the overplus (if any), upon demand, to owner or owners of such cattle or sheep: that, the act of parliament having been so made as aforesaid, said commissioner did, after the making of the said of parliament, and by virtue and in pursuance thereof, before the said time when &c., and before the execu- n of his award in the said act mentioned, by notice in riting under his hand, bearing date a certain day and ar therein mentioned, to wit, the 19th July, 1833 (and hich notice was duly affixed on the principal outer door the said parish church of Bepton aforesaid, on Sunday, e 21st July, in the year last aforesaid, previous to divine ervice), order and direct that all the rights of common in, ver, or upon the said common called Bepton common, nd the wastes and waste lands contiguous or belonging hereto, should be from the time of affixing the said writ- g on the principal outer door of the said parish church Bepton for ever thereafter extinguished: that, the said riting having been so made and affixed as aforesaid, all ghts of common in, over, and upon the said common lled Bepton common, and the wastes and waste lands ntiguous and belonging thereto, thereby became and re wholly extinguished by virtue of the said act of par- ment: that the close in which &c., called the common, herwise Bepton common, and the said common in the d act of parliament mentioned, were and are one and same common, and not other and different: and that, cause the plaintiff, afterwards, and after the said rights

Averment that the commissioner duly made his award, extinguishing all rights of common over B. common;

and that, because the cattle in question were

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after such extinguishment permitted to depasture on B. common, defendant distrained them in pursuance of the act.

of common had been and were so extinguished as aforesaid, to wit, at the said time when &c., permitted his said cattle in the declaration mentioned to go, depasture, and feed, and because the same at the said time when &c. were on the said close in which &c., depasturing and feeding there, and over which said close the rights of common had been so extinguished as aforesaid, the defendant, as such occupier as aforesaid, well avowed the taking of the said cattle in the said declaration mentioned in and upon the said close in which &c., as, for, and in the name of a distress by virtue and in pursuance of the said act of parliament: and this, &c.

Plea—that the locus in quo adjoined W. common, and had never been separated or divided therefrom by any inclosure or fence;

Plea—That the said close in which &c., before and at the said time when &c., and from time whereof the memory of man is not to the contrary, was and still is contiguous and next adjoining to a certain common or waste consisting of divers, to wit twenty, acres of waste, situate, lying, and being in the parish of Woolbeding, in the county aforesaid, called Woolbeding common, and had never been separated or divided from the said last-mentioned common called Woolbeding common by any inclosure, hedge, or fence whatever sufficient to prevent cattle

e said close in which &c. to use the said common of pas-
re in, upon, and throughout the said close in which &c.,
om time immemorial had gone, escaped, and rambled,
d had been used and accustomed to go, escape, and
mble therefrom into the said common called Woolbed-
g common, and to intermix there and feed with cattle
om time to time feeding on the grass growing on the said
st-mentioned common: that, by the said act of parlia-
ent in the avowry mentioned, it was, amongst other
ings, enacted that the several and respective allotments
be made in the said common called Bepton common
d waste lands in the said act of parliament and avowry
entioned, after the division thereof, should, within twelve
alendar months, to be computed from the signing and
ealing the award of the said commissioner in the said act
nd avowry mentioned, or within a shorter space of time,
o be computed by the said commissioner either before or
fter the execution of his award, be inclosed, fenced, and
ivided, either by hedges, ditches, or otherwise, as the
aid commissioners should direct; all which said inclosures
nd fences should be so made, planted, and guarded by
nd at the proper costs and charges of the respective per-
ons to whom the said allotments should be respectively
ade, in such manner, share, and proportion as the said
ommissioner should in and by his award direct: that the
aid close in which &c. had not yet been, nor was it at the
aid time when &c., inclosed, fenced, separated, or divided
rom the said common called Woolbeding common by
ny hedge, ditch, or otherwise, sufficient to prevent cattle
eeding and depasturing in the said common called Wool-
eding common from erring or escaping therefrom into
he said close in which &c.: that the plaintiff was not, nor
ere the persons having right of common on the said com-
on called Woolbeding common, nor the owners or oc-
upiers of the soil thereof, by the said act, or by the
ward of the said commissioner, or otherwise, directed,

that, by the inclosure act, it was enacted that the allotments made in B. common should within a given time be fenced and inclosed by the persons to whom the allotments should be made;

that B. common was not at the time when &c. inclosed so as to prevent cattle feeding in W. common escaping therefrom into the former;

that the W. commoners were not bound to erect any fence between W. common and the locus in quo;

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that plaintiff, as an occupier of land and premises in W., had right of common in W. common,

and, in the exercise of that right, put the cattle in question thereon;

obliged, or bound to set up or erect any inclosure, or fence whatsoever between the said close in wh and the said common called Woolbeding commo separate or divide the said close in which &c. f said common called Woolbeding common: that, be at the said time when &c., the plaintiff was the occu lawfully possessed of certain land and premises i the parish of Woolbeding aforesaid, and that he the occupiers of the said land and premises for fo last past had had and used, and of right ought to h and used, and still of right ought to have, commo ture for his and their commonable cattle levant chant upon the said land and premises, in, o throughout the said common called Woolbeding every year, and at all times of the year, at their and pleasure; and, being so possessed thereof, before the said time when &c., to wit, on the day in the said declaration mentioned, put his said the said declaration mentioned (the same being t there his own commonable cattle levant and co and upon the said land and premises with the a

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ne when &c., to wit, on &c., of their own accord, and thout the knowledge or consent of the plaintiff, went, aped, and rambled out of the said common or waste led Woolbeding common into the said close in which ., and remained and continued there inon the occasion resaid without the knowledge of the plaintiff, until the endant, before the plaintiff had or could have any no- that the said cattle were in the said close in which , to wit, at the said time when &c., of his own wrong : the said cattle in the said close in which &c., and astly detained the same against sureties and pledges, in ner and form as the plaintiff had above thereof com- ned against the defendant: and further, that no justice e peace of the county of Sussex had at any time since said time when &c. directed or ordered the plaintiff to any sum of money or penalty for the said cattle so en and distrained by the defendant as aforesaid being he said close in which &c. at the said time when &c.: this &c.

and remained there until the plaintiff, of his own wrong, seized and detained them;

and that no justice of the peace had ordered the plaintiff to pay any sum for the cattle so distrained.

General demurrer and joinder.

Mr. *Platt*, in support of the demurrer.—The plea afds no answer to the avowry. All rights of common in pton common being extinguished by the award of the mmissioner under the act set forth in the avowry, the aintiff's right of common pur cause de vicinage is in like inner at an end. Where one holding lands in the parish A., has in respect of such lands a right of common on common and also common pur cause de vicinage on B. mmon, the commoners of B. have the like right over mmon A.; so that each set up commoners has compenion for the liability to be incroached upon by the other. it, where the one common is sufficient only for fifty head cattle, and the other for one hundred, the commoners the former have no right to surcharge their com-

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mon, and so depasture their cattle on the latter (a). the rights of common upon Bepton common havin altogether, there was no longer that reciprocity the commoners of Bepton and those of Woolbedi is held to excuse mutual trespasses. From the the affixing of the award on the door of the c Bepton in pursuance of the act, Bepton commo to be commonable land. The act having exti the right, the absence of fencing or inclosing wil vive it. Besides, it is not stated in the plea that t ant was bound to fence.

Mr. *W. H. Watson*, in support of the demurr plea in bar sets up a quasi right of common pur vicinage. In Comyns's Digest, "Common," (E), pur cause de vicinage is said to be "when two towns have common in the fields within their tow are open to the fields of the neighbouring towns, cattle put to use their common there escape into of the neighbouring towns, et e contra." "And this common is but *an excuse for a trespass.*" thorities in Viner's and Bacon's Abridgments (b)

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ame effect: all of them shew that there is no *right of common* in the adjoining common, but merely that the non-inclosure of the adjoining common is an excuse for the trespass. It is analogous to the excuse of cattle straying by reason of defect of fences. Then, what is the effect of the act for inclosing Bepton common? To this act the commoners of Woolbeding were no parties; it amounts to no more than a private agreement between the Bepton commoners: and, admitting for the sake of argument that the common pur cause de vicinage would be put an end to by the *inclosing* of Bepton common, it is clear that until it is inclosed the antient excuse of trespass still exists. [Lord Chief Justice *Tindal*.—At present I do not see that the boundary line between the two commons ought to be fenced at the expense of Bepton.] The act was obtained by and for the benefit of the inhabitants of Bepton. They therefore were bound to inclose, not only inter se, but against third parties also. Unless the inhabitants of Woolbeding are bound to fence or separate their common from that of Bepton, their excuse remains as before; and the mere agreement of the Bepton commoners that their common shall be extinguished will not deprive the Woolbeding commoners of this excuse until inclosure actually takes place. [Mr. Justice *Bosanquet*.—Suppose the commons of two manors adjoin, and the commoners of the one manor surrender their rights to the lord, will that affect the common pur cause de vicinage of the tenants of the other manor?] The present case goes even further: the act makes it compulsory on the inhabitants of Bepton to inclose. [Lord Chief Justice *Tindal*.—The difficulty is this—the excuse or the right should be reciprocal. By the act of parliament and the award of the commissioner, the rights of common in Bepton are extinguished: the advantage therefore would be all on one side.] It may be admitted that the Woolbeding commoners would be bound to, remove their cattle trespassing on Bepton

Semble, that the cattle would be liable to distress,

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or the owner to an action of trespass, notwithstanding the want or defect of fences, if the cattle were suffered to remain in the locus in quo after notice to the owner that they were trespassing there.

common, after *notice* (*c*), but still the excuse cattle *straying there* exists, though not for them to continue there.—By the act, any occupier ton is impowered to distrain cattle depasturing locus in quo, and to impound the same until t shall pay such sum (within certain limits) as a j the peace shall direct; and if such sum, with cos paid within five days, the justice is authorized to

(*c*) "It seems that, though, where cattle escape into the land of another through the defect of fences which the tenant of the land is bound to repair, no action will lie against the owner of the cattle for this damage, nor is it lawful to distrain them, because it was the tenant's own fault that he did not repair his fences; yet, if the tenant gives the owner of the cattle notice that they are upon his land, and the owner of the cattle suffers them to continue there after such notice, they are then trespassers, and may be distrained for the damage done after the close of another wh to inclose, and notice the owner of the cattl are in the close, but them to continue the tice, it is lawful for t of the close to distrain owner of the cattle wil them out of the close a it seems they may be damage feazant. T cited in Edwards v. I Leon. 93, in which it i where I am bound to land against another, fault of inclosure the c other escape into my l

attle to be sold. It was therefore incumbent on the rowant in the present case to procure an adjudication of magistrate within five days after the taking of the distress. The plea alleges that none was obtained: consequently the plaintiff was a trespasser—Com. Dig. "Trespass," (C 2.). [Lord Chief Justice *Tindal*.—Was it not rather for the plaintiff to make application to a justice? A party distraining cattle damage feazant might at common law detain them until the owner tendered amends.] By going to the justice, the plaintiff would be admitting the trespass. The party making the distress claims to be armed with authority to distrain and sell, and therefore he is to be the actor.

Mr. *Platt*, in reply.—The law as to common pur cause de vicinage is as stated: but all the authorities contemplate the existence of two commons the commoners of which have the same reciprocal rights or excuses at the same time: By the act, the commissioner was authorized, *before the execution of his award*, by notice in writing to be affixed on the principal door of the parish church of Bepton, to direct all or any of the rights of common in Bepton common to be extinguished or suspended: and the act provides, that, *from the time of affixing such notice on the church door, such rights shall be extinguished* or suspended accordingly. The act further proceeds to direct that the several allotments should, within a certain time *to be computed from the signing and sealing of the award* of the commissioner, be inclosed, at the expense of the persons to whom the respective allotments should be made. The act therefore contemplates the absolute extinguishment of the rights of common before any allotment or inclosure could take place. And, when the common rights in Bepton common were extinguished, it ceased to be commonable land for any purpose whatsoever.—Then, the act provides, that, if during such suspension or after such extinguishment of the

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rights of common or other rights, any of the proprietors or occupiers or claimants of pasturage and common rights in Bepton, or any other person or persons whomsoever, should *permit* his, her, or their cattle to depasture on the locus in quo, it should be lawful for any other occupier to distrain them. The use of the word "permit" is strongly indicative of the intention of the legislature that such trespasses were to be guarded against by the owners of the cattle. [Lord Chief Justice *Tindal*.—Can that provision apply beyond the subject matter of the act—the Bepton commoners?]—With respect to the non-procurement of an adjudication of a justice, the short answer is, that the plaintiff replevied the cattle immediately on the distress. Having thus made his election to try the right, he cannot now object that the avowant has omitted to adopt that course which his own act has prevented.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—

The question in this case arises upon the pleadings on the record, in which, after a declaration in replevin for taking the plaintiff's cattle upon Bepton common, the defendant avows for damage feasance, stating in his avowry that he, the defendant, before and at the time of passing

ou[illegible]d be extinguished;" and that, if, after such notice, [illegible]f the claimants of pasturage or common rights, *or* [illegible] *other person or persons whomsoever*, should permit i[illegible] cattle or sheep to feed or depasture on any of the d[illegible] in which such rights of common were so extinguish- [illegible] should be lawful for any other proprietor or occu- [illegible] to distrain them in manner pointed out in the act. [illegible] avowry then proceeds to state that the commissioner [illegible]n a certain day give notice under the act that all the [illegible]s of common in, over, or upon the said common called [illegible]on common should be for ever thereafter extinguish- [illegible], [illegible]hereby the same were extinguished accordingly; and [illegible] because the plaintiff, after such rights of common [illegible] extinguished, permitted his cattle to feed and depas- [illegible] on Bepton common, he, the defendant, as occupier of [illegible]aid cottage and land, distrained them under the power [illegible]iven by the statute. To this avowry, the plaintiff [illegible]ds in bar, that the said place in which &c. hath always been contiguous and next adjoining to a certain other common called Woolbeding common, and hath never been separated therefrom by any fence sufficient to prevent cattle feeding on Woolbeding common from erring and escaping into the close in which &c.: and the plea then prescribes for a right of common pur cause de vicinage, from one common to the other. The plea in bar then proceeds further to set out a clause in the inclosure act by which the several allotments made under the act are directed to be fenced and divided by sufficient hedges or otherwise within the time mentioned in the act; and that the close in which &c. had not yet been fenced and divided from Woolbeding common; and that neither he the plaintiff nor the persons having right of common on Woolbeding common were by the said commissioner, or otherwise, directed to set up any inclosure or fence between the close in which &c. and Woolbeding common: and it lastly states that the plaintiff's cattle, being lawfully put upon Woolbeding

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common, erred and escaped of their own accord and without his consent from Woolbeding common into the place in which &c.—To this plea there is a general demurrer, and the question raised upon the demurrer and argued before us, is, whether the plaintiff is a trespasser by reason of his cattle which were rightfully upon Woolbeding common erring and straying thence into the locus in quo, that is, into Bepton common, after the extinguishment of the rights of common thereon under and by virtue of the inclosure act set forth in the avowry. The nature of common pur cause de vicinage is clearly laid down and explained by Lord Coke in 4 Rep. 38. b.; and by that book it appears to be, not any right of feeding on the adjoining common, but only "an excuse of trespass by reason of the antient usage which the law allows, to avoid suits which would arise if actions should be brought for every such trespass when no separation or inclosure is between the commons." "And therefore," it is added, "one may inclose against the other; for, cessante causâ, cessat effectus." The same law is laid down by Mr. Justice Powell, in the case of *Broomfield* v. *Kirber*, 11 Mod. 72. "This sort of common must be in nature of an escape, and so an excuse. For, a man cannot put in his cattle in common of vicinage originally: but they must escape. They may inclose one against the other, if they will be at the expense (*a*)." And it appears by a much more modern case (*Gullett* v. *Lopes*,

Nature of common pur cause de vicinage.

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Mode of terminating common pur cause de vicinage.

oolbeding, but that the locus in quo, being part of Bep-
common, was still left open to Woolbeding common,
much as it was before the inclosure act. With respect
refore to inclosure, the only mode of terminating a
mmon pur cause de vicinage which is mentioned in the
ks, it is clear that no such termination exists in the
sent case. But it is contended on the part of the
want, that, by the operation of the inclosure act, this
ht of common pur cause de vicinage was extinguished.
d this is contended in argument upon two distinct
unds: first, it is argued, that all rights of common upon
pton having been extinguished by the act, all recipro-
y between the commoners on the adjoining commons is
ne; and that, as there can be no longer any stray from
pton common to Woolbeding, so the Woolbeding com-
mers can no longer excuse their cattle from straying
on the place which was before the inclosure act the
pton common. But, without deciding whether such
uld be the legal consequence or not, if due notice had
en given to the plaintiff that all rights of common upon
pton common had been extinguished by the act of par-
ment, we think it clear, that, in order that such extin-
ishment of the rights on Bepton common may put an
d to the right of straying from the adjoining common, and
ke the commoners of such adjoining common trespass-
if their cattle stray therefrom, there must be notice of
e extinguishment. The question therefore is, has there
en any such notice? Now, it is admitted by the plead-
gs that there has been no *inclosure*, the most effectual
de of giving notice that the license to intercommon or
e excuse of mutual trespasses, has been put an end to.
nd, as to any notice of what has been done in an adjoin-
g township under a private act of parliament relating to
at township, the act of parliament itself is no notice to
em. And, lastly, there is no allegation upon the record
any notice in fact that the commoners of Woolbeding

Quære, whether a notice in fact to the commoners of W. *(without inclosure)* that all rights of common in B. were extinguished, would put an end to the legal excuse of trespasses pur cause de vicinage.

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were not to permit their cattle any longer to stray from their own common: so that, upon the whole, we think there has been no sufficient notice in this case to make the Woolbeding commoners trespassers for continuing the use of a practice which has been carried on from the earliest time under an implied agreement, which agreement, in the absence of such notice, they might well suppose to continue in full force.—But, in the next place, it is argued, that, by the direct operation of the statute, the right of common pur cause de vicinage is taken away; for that the commissioner directed by his notice that *all the rights* of common in, over, or upon the place in question should be for ever thereafter extinguished. The answer, however, to this argument appears to be twofold—first, the common pur cause de vicinage is not strictly and properly a right of common at all; it is merely an excuse for a trespass—but, secondly and principally the act is only a private act of parliament, and is no more than an agreement between the Bepton commoners to extinguish their own rights of common, sanctioned and enforced by the legislature. The act, therefore, has no binding power on the rights of those who are strangers to it, and no parties to the agreement which it professes to confirm. So far, therefore, as de-

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Tuesday, Jan. 27th.

The defendant having entered into a contract for the sale of an estate to the plaintiff, the latter objecting to the title, a bill in equity was filed against him for not completing the purchase, which bill was ultimately dismissed with costs. In an action against the vendor to recover damages for the breach of contract—Held [see pp. 448 et seq.]

HODGES *v.* THE EARL OF LITCHFIELD.

SSUMPSIT for the breach of a special contract for sale of an estate by the defendant to the plaintiff. The laration stated, that, before the making of the promise undertaking of the defendant thereinafter mentioned, wit, on the 7th November, 1828, by certain articles of reement made and entered into between R. H. Wyatt, agent for and on behalf of the defendant (then Viscount ison), his heirs, executors, and administrators, of the e part, and the plaintiff, for himself, his heirs, execurs, and administrators, of the other part, the said R. H. Vyatt agreed to sell, and the plaintiff agreed to purchase he free and exclusive fishery of the defendant in the river Trent, as advertised to be sold by auction on the 21st October then last, with the right and privilege of landing nets upon and angling from the lands of the landowners adjoining the river, and the several farms, lands, and hereditaments described in the schedule to the said articles of agreement, for the sum of 21,500*l.*, of which the sum of 1500*l.* was then paid, and the sum of 20,000*l.*, the remainder thereof, was to be paid on the 25th March then next; and, if the payment should be delayed after that time, and such delay should be occasioned by the plaintiff, the plaintiff should pay lawful interest on his purchase money from thence until the time of final payment, and should be entitled to the rents and profits of the premises rom the said 25th March then next, to which time all utgoings would be cleared by the defendant; and it was hereby declared that an abstract of the title should be eady for delivery to the plaintiff on or before the 25th December then next at Mr. Keen's office in Stafford; and the plaintiff, or any person on his behalf, should object the defendant's title, or require any act, matter, or ing to be done, procured, or executed for the comple-

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tion thereof, notice in writing of the particular objection or matter required should be given to Mr. Keen on or before the 21st February then next, or otherwise the plaintiff and all persons claiming under him should waive the same, and should be held to have accepted the title; of which articles of agreement the defendant had notice: that thereupon, in consideration of the premises, and also in consideration that the plaintiff at the defendant's request had undertaken and faithfully promised the defendant to perform and fulfil all things in the said articles of agreement contained on his part and behalf to be performed and fulfilled, the defendant then and there consented to and approved the said articles of agreement, and then and there undertook and faithfully promised the plaintiff that the defendant would make or procure to be made a good title to the said estate, free of tithes, on or before the said 25th March then next, and would perform and fulfil all things in the said articles contained on his part and behalf to be performed and fulfilled. Averment, that an abstract of the title to the said estate being afterwards, and before the said 25th December then next, to wit, on &c., delivered to the plaintiff, one R. H. W. J., a conveyancing coun-

nt well and truly performed and fulfilled all things rein contained on his part and behalf to be performed l fulfilled, according to the tenor and effect, true in- t, and meaning thereof: yet the defendant, not regard- the said articles of agreement, did not nor would on before the said 25th March in the year last aforesaid, at any time afterwards, make or procure to be made a od title to the said estate, free of tithes, but wholly re- sed and neglected so to do: by reason of which said se- al premises, the plaintiff not only lost and was deprived all the benefits and advantages which might and would herwise have arisen and accrued to him from the com- tion of the said purchase, but was put to great charges d expenses, amounting in the whole to a large sum of ney, to wit, the sum of 1000*l.*, in and about *the nego- ing and agreeing for the purchase of the said estate, and ing the same surveyed;* and in and about *the investigat- the title to the said estate, and the existence and effect the said supposed modus in the said articles mentioned;* d in and about *his defence of and in a certain suit com- ced and prosecuted by the defendant against the plain- in the court of Chancery for compelling a specific per- mance by the plaintiff of the said articles of agreement,* d in which suit the bill filed by the defendant against plaintiff was dismissed by the same court; and in and out *the making and performing of divers journies* and herwise respecting the said purchase; and also thereby *plaintiff lost and was deprived of a great part of the ns and profits which he might and would otherwise have ds and acquired from using and employing the said of* 1500*l.* *so paid by him as aforesaid, and other mo- provided and kept by the plaintiff for the completion the said purchase;* and suffered and sustained divers ses, to a large amount, to wit, to the amount of 200*l.*, *the resale of certain sheep, bricks, and hurdles pur- sed by the plaintiff for the stocking of the said farms,*

See p. 448.
See p. 449.
See p. 450.
See p. 452.
See p. 452.

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HODGES v. The Earl of LITCHFIELD.

lands, and hereditaments, and improving the sa
view to the completion of the said purchase (*a*).

The defendant pleaded the general issue.
order of Nisi Prius, a verdict was entered for th
subject to the opinion of the court, after an aw
have been made by an arbitrator, who was th
powered to ascertain and settle the amount wl
be properly payable to the plaintiff on each an
the following heads of claim in the declaration,
court should be of opinion that the plaintiff was
recover thereon respectively: that is to say—fi
about the negotiating and agreeing for the p
the estate agreed to be sold, and having the sa
ed—secondly, in and about investigating the t
said estate, and the existence and effect of a
modus in lieu of tithes—thirdly, in and about t
of the suit in Chancery mentioned in the de
fourthly, in and about the making and perform
vers journies, and otherwise respecting the
fifthly, the plaintiff's loss in being deprived of
and profits he might have made from using
mentioned in the declaration.

See p. 448.
See p. 449.
See p. 450.
See p. 452.
See p. 452.

[redacted]

iff in the investigation of the title, allowed on tax- 12*s.* 6*d.* the expenses and coach hire of the same n a journey to and from Stafford relating to the er, and also allowed on taxation—6*l.* 17*s.* 2*d.*, the on searching for judgments and other incum- which searches were made on the 27th February, 11*s.* 4*d.*, fees paid in other necessary searches— *s.* expended in fees to counsel. But, of the said 7*l.* 1*s.* 10*d.*, the arbitrator found that 6*l.* 17*s.* 2*d.* licitors' charges in attending to make the searches mentioned, and the sum of 16*l.* 9*s.* 4*d.* for solici- ges in preparing conveyances, on the 27th Febru- , and, of the said sum of 25*l.* 8*s.*, the sum of 10*l.* or counsel's fees in settling the same conveyances: o found, that, of the said sum of 87*l.* 1*s.* 10*d.*, the m of 10*l.* 18*s.* was for charges incurred after the e filing of the bill by the defendant to compel fic performance above mentioned. As to the d of claim, the arbitrator found, that the said ismissed with costs; that the plaintiff's costs in himself against the said bill were taxed as be- ty and party; and that the amount of such taxed been duly paid to him; but that there remained f 194*l.* 4*s.* 11*d.*, which had been paid by him to ors for the extra charges as between solicitor and the course of such defence: and the arbitrator t the said sum of 194*l.* 4*s.* 11*d.* would be reason- ble to the plaintiff under the third head. As to head of claim, the arbitrator found, that, in the the negotiation for and about the purchase, and ence of the plaintiff in the said suit, it became and prudent for the plaintiff to take certain and to incur certain expenses; and that the sum uld be properly payable to the plaintiff in re- eof. As to the fifth head of claim, the arbitra- , that, upon the dismissal of the defendant's bill

Third head.

Fourth head.

Fifth head.

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in equity, with costs, the deposit of 1500*l.* theretofore advanced by the plaintiff was ordered to be returned; that the plaintiff thereupon applied to the court of equity for an order for the allowance of interest thereon; and that an order was made (and had been performed) for the payment of interest at the rate of 4*l.* per cent. from the 7th November, 1828, to the 23rd June, 1832, when the said deposit was returned: and, if the court should be of opinion that the plaintiff was entitled to recover any further compensation for the loss of the use of the said 1500*l.* during the period last mentioned, the arbitrator found that the sum of 54*l.* 3*s.* 3*d.* would be properly payable to him in that behalf.

The question for the opinion of the court was—whether the plaintiff should retain the verdict; and, if so, whether for the sum of 439*l.* 0*s.* 8*d.*, or for what other sum.

It was agreed that the plaintiff's claim upon each of the above heads should be discussed and determined separately.

1. That the plaintiff was not entitled to recover for expenses

1. As to the several sums of 6*l.* 11*s.* 8*d.* claimed by the plaintiff for the expenses of negotiating and agreeing for

by the plaintiff for his own information, and at a time when the existence of a contract was matter of uncertainty. Neither is he entitled to be reimbursed the sum paid for the survey, which was totally unnecessary at that stage of the bargain.

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2. That he was entitled to recover for the costs of investigating the title —comparing the title deeds with the abstract, and journies for that purpose, and searching for judgments and incumbrances: but not the costs of a conveyance prepared before the title was cleared; nor expenses contracted after the filing of the bill in equity.

2. As to the expenses incurred in and about investigating the title to the estate, and the existence and effect of the supposed modus in lieu of tithes—

Mr. *Thesiger* submitted that the plaintiff was entitled to be paid his solicitors' charges on such investigation, with the exception of 16*l.* 9*s.* 4*d.*, the charges for preparing the conveyances of the 27th February, 1829 (which was after an objection had been taken to the title); and also all the other charges mentioned in the award under this head, with the exception of 10*l.* 10*s.* paid for counsel's fees on the last-mentioned conveyances (*a*). With respect to the expenses incurred in the journey to and from Stafford, where the title deeds were, for the purpose of investigating the title, he referred to 1 Sugden's V. & P., 9th edit. p. 449, where the rule upon the subject is thus stated— "The seller is bound to produce the deeds, in order that the abstract may be examined with them, although they are not in his possession and the purchaser is not to be entitled to the custody of them. But, if they are in the possession of a third person, the purchaser's solicitor it seems must send to the place where the deeds are, in order to examine them with the abstract; and the seller must pay the expense of the journey."

Mr. Serjeant *Talfourd*, contra, objected to the allowance of the costs of the journey to Stafford for the investigation of the title, and of the 6*l.* 17*s.* 2*d.* charged for searching for judgments and incumbrances, on the ground

(*a*) See Jarmain v. Egelstone, 5 Car. & P. 172.

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that the investigation and the searches were made too early; before they were incurred the plaintiff should have ascertained whether or not the title could be completed. At all events, he contended, the plaintiff was not entitled to recover the charges incurred after the filing of the bill for a specific performance.

Lord Chief Justice TINDAL.—The only items under this head which I think ought to be disallowed, are, the charges for preparing the conveyances of the 27th February, 1829, and counsel's fees thereon, and the costs incurred after the defendant filed his bill to enforce the performance of the contract. Searches for judgments should be made, and the deeds compared with the abstract, at an early period, otherwise much unnecessary expense is very often unavoidably contracted.

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3. That he was not entitled to the extra costs of the equity suit.

3. As to the extra costs paid by the plaintiff to his solicitors in the course of his defence to the suit in equity—

Mr. Serjeant *Talfourd* objected that these were not recoverable. He cited *Hathaway v. Barrow*, 1 Camp. 151.

[redacted]

Mr. *Thesiger*, contra.—In *Sandback* v. *Thomas*, 1 Stark. 06, it was ruled, that, in the calculation of damages in an ction for maliciously holding to bail, the plaintiff is entitled to recover, not merely the taxed costs, but the costs s between attorney and client: Lord Ellenborough saying—" If by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses; if it were otherwise, it would come to this, that an attorney would not maintain an action against his client for the extra costs." In *Jones* v. *Dyke*, Sugden's V. & P., App. 319, in an action to recover back deposit money and damages on the vendor's failure to complete e sale, Lord Chief Baron Macdonald held the plaintiff entled to recover the *whole* of his solicitor's charges. Lord ief Justice Best, in *Webber* v. *Nicholas*, 1 R. & M. 420, ugh he felt himself bound to adhere to the decision of the rt in *Sinclair* v. *Eldred*, observed that he was more lined in favour of the view taken by Lord Ellenborough *Sandback* v. *Thomas*. Neither this latter case, nor the nion expressed by Lord Chief Justice Best in *Webber* *Nicholas*, was adverted to in *Jenkins* v. *Biddulph*. e purchaser is clearly entitled, on principle, to be inmnified against all charges necessarily attendant (as se costs may be said to be) upon the investigation of e vendor's title: the extra costs are in truth damages sulting to the plaintiff in consequence of the defendant's ilure to perform his contract.

Lord Chief Justice TINDAL.—Undoubtedly, the necessary expenses attendant upon the investigation of the defendant's title, and directly consequent upon the non-performance by him of the contract he has entered into, are recoverable by the plaintiff: but I think the extra costs paid or payable by the plaintiff in respect of his defence o the suit in equity for a specific performance do not fall within the description of charges resulting from the con-

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tract. In conformity with the cases cited on the part of the defendant, I think this claim should be disallowed.

Mr. Justice PARK.—The taxed costs in every case fall short of the costs actually incurred by the successful party: there is no more reason why the plaintiff should be allowed them in this case than in any other.

The rest of the court concurred.

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4. That he was entitled to the costs of all journies necessarily made in furtherance of the contract: but not to those incurred before the contract was entered into, or pending the equity suit.

4. As to the expenses of journies necessarily incurred respecting the purchase—it appearing that some of these journies were made before the contract was actually entered into, and that others arose out of the plaintiff's defence to the suit in equity—

PER CURIAM.—The costs of journies necessarily taken in furtherance of the contract may be allowed; but those incurred before the contract was entered into at all, and those contracted in the course of the suit, ought not—the former, on the ground stated with reference to the first claim—the latter, on the ground stated in answer to the

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Monday, Jan. 26th.

In trespass for seizing goods, the defendants pleaded that a commission of bankrupt issued against one J. S., under which all his goods were assigned to C. and M., that the goods in question were the goods of C. and M., as such assignees, and that the plaintiff, claiming title to the goods under colour of a gift thereof to him by J. S., became possessed of them; and justified the seizing of them as the servants and by the command of the assignees. The plaintiff replied that the goods in the declaration mentioned were not the goods of C. and M. as such assignees, but were the goods of him the plaintiff:—Held, that, by this replication, the commission and assignment to C. and M. were admitted, and that the only issue to be tried was as to the plaintiff's title to the goods.

JONES *v.* BROWN and Others.

THIS was an action of trespass for breaking and entering the plaintiff's house, and taking his goods.

As to the breaking and entering, the defendants suffered judgment by default; and, as to the residue of the cause of action, pleaded—first, not guilty—secondly, that the goods in the declaration mentioned were not the goods of the plaintiff—thirdly, that, before and at the time when &c. in the declaration mentioned, to wit, on &c., and from thence continually until the issuing of the commission of bankrupt thereinafter mentioned, one G. Metcalfe was a grocer, dealer, and chapman within the meaning of and subject to an act &c. &c., and during all that time did use and exercise the trade of a grocer, dealer, and chapman, and was a trader within and subject to the provisions of the said act; and, the said G. Metcalfe, so using and exercising the trade of a grocer, dealer, and chapman &c., afterwards, to wit, on &c., became and was indebted to one Cornthwaite in the sum of 100*l.* and upwards, for a true and just debt due and owing to him from Metcalfe, and the said G. Metcalfe afterwards, to wit, on &c., became and was a bankrupt within the true intent and meaning of the said statute; and thereupon a certain commission of bankrupt under the great seal &c., grounded upon the said statute, upon the petition of Cornthwaite, was duly awarded and issued against Metcalfe, directed to certain commissioners therein named &c. &c. [setting forth the commission and proceedings under it, the choice of assignees—Cornthwaite and Mills—and the assignment of the bankrupt's effects to them]: Averment—that the goods, chattels, and effects in the declaration mentioned were the goods, chattels, and effects of Cornthwaite and Mills as such assignees as aforesaid, and, just before the said time when &c. in the declaration mentioned, and whilst Met-

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JONES v. BROWN.

calfe remained and continued such bankrupt as aforesaid, were in the possession of Metcalfe; that the said goods, chattels, and effects so being the goods &c. of Cornthwaite and Mills as such assignees, the plaintiff, claiming title to the said goods &c. under colour of a certain gift pretended to have been thereof made to him by Metcalfe, whereas nothing of or in the said goods &c. in the declaration mentioned ever passed by virtue of that gift, afterwards, and before the said time when &c., and whilst the said goods &c. in the declaration mentioned were the goods &c. of the said Cornthwaite and Mills as such assignees as aforesaid, and whilst Metcalfe remained such bankrupt as aforesaid, to wit, on &c. in the declaration mentioned, seized and took, and became and was possessed of the said goods &c. in the declaration mentioned: and thereupon the defendants, on the day and year in the declaration in that behalf mentioned, as the servants and by the command of Cornthwaite and Mills, so being such assignees as aforesaid, seized, took, and carried away the said goods, chattels, and effects in the declaration mentioned, so being in the possession of the plaintiff as aforesaid, as they lawfully might for the cause aforesaid; which

[redacted]

shew that the goods in question had been bonâ fide purchased by him from Metcalfe, who had been permitted by the assignees to continue in possession of them. On the cross-examination of the plaintiff's witnesses, it appeared that the supposed sale took place under circumstances calculated to induce a suspicion as to the bona fides of the transaction. No evidence was offered on the part of the defendants. The learned judge summed up to the jury, and left it to them to say whether or not the transfer of the goods by Metcalfe to the plaintiff was bonâ fide. The plaintiff's counsel thereupon objected, that, the defendants having given no evidence to shew that Cornthwaite and Mills were Metcalfe's assignees, they were, as against the plaintiff, who had a primâ facie title to the goods by possession, wrong-doers. The learned judge thought that the objection should have been taken before; and that the plaintiff had by his replication admitted all the allegations in the third plea, save that the goods were the property of the assignees, which therefore was the only point at issue between the parties. The jury thereupon returned a verdict for the defendants upon the issues joined, and assessed the damages on the judgment by default at one farthing.

Mr. *Hill*, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground urged at the trial.

Mr. Serjeant *Goulburn*, Mr. *Humfrey*, and Mr. *Mellor*, shewed cause.—The only question put in issue by the pleadings was, in whom was the title to the goods: this the plaintiff's own evidence clearly established in Metcalfe's assignees—a fact indeed admitted by the replication. If a plaintiff in trover offers written evidence to establish a property and fails in so doing, he is not allowed to recur to and rely on a mere possessory title. This was so ruled in *Sherriff* v. *Cadell*, 2 Esp. 617, where Lord Kenyon

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says: "The plaintiff having opened his case and attempted to go into evidence of property through the medium of written evidence, which evidence too had in fact in some measure proved a title out of him, he should not then be allowed to recur to parol evidence to establish his title."—Then, as to the period at which the plaintiff took the objection to the want of evidence of the title of the assignees, *Robinson* v. *Cook*, 6 Taunt. 336, and *Abbott* v. *Parsons*, 5 M. & P. 521, 7 Bing. 563, are decisive to shew that such objection came too late. In the former, it was held, that, if the plaintiff's counsel acquiesce in the judge's ruling at the trial, and by such acquiescence the defendant is induced to take a verdict without going into his case, the plaintiff will not afterwards be permitted to move for a new trial on the ground of a misdirection: and, in the latter, the court refused to permit a party to move for a new trial on an objection to the applicability of evidence, the objection not having been taken before the judge commenced his summing up.

Mr. *Hill* and Mr. *Amos*, in support of the rule.—In trespass, as against a wrong-doer, possession (either actual or constructive) of the property which is the subject

[redacted]

assignees. Under these circumstances, the plaintiff ought to have had a verdict. The plaintiff's omission to take issue in his replication on the other matters stated in the third plea, does not dispense with the necessity of proof of title on the part of the defendants.

Lord Chief Justice TINDAL.—This is an action of trespass for breaking and entering the plaintiff's house and taking his goods. As to the breaking and entering the house, the defendants have suffered judgment to go by default; and, as to the taking of the goods, they have pleaded—first, not guilty—secondly that the goods were not the goods of the plaintiff—thirdly, in substance, that a commission of bankrupt issued against Metcalfe, the person from whom the plaintiff obtained possession of the goods (and, as the jury have found, fraudulently), that two persons were chosen assignees under such commission, that the goods were duly assigned to them, and that the defendants, as the servants and by the command of the assignees, seized them. The plea therefore standing uncontradicted shews a sufficient title in the assignees. The defendant confines his replication to a simple denial that the goods were the goods of the assignees, and an assertion that they were his goods. Upon this state of the record, I am of opinion that all that was put in issue was the plaintiff's title to the goods, all the rest of the allegations in the third plea being admitted. In the ordinary case of an action of trespass for seizing goods, to which the defendant pleads a judgment and a writ of fi. fa. against A., that the goods in question were the goods of A., and were taken by the defendant under and by virtue of the writ; if the plaintiff in his replication merely takes issue on the property of the goods in A., he thereby admits the judgment and that the writ duly issued. In the present case, it was open to the plaintiff to shew either that the goods never were the property of the bankrupt; or, perhaps,

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that the assignees had permitted the bankrupt so to deal with them as to induce a belief that he had a legal right to part with them, and that the plaintiff had bonâ fide purchased them from him. Nothing of the sort, however was in evidence: the plaintiff attempted to set up a transfer which the jury found to have been fraudulent. Upon the other point, though it is not necessary to rest the decision of the case upon it, I am of opinion that the objection as to the want of proof of the title of the assignees came too late.

Semble, that an objection taken by the plaintiff after the judge has summed up, as to the want of evidence of the title of the assignees, came too late.

Mr. Justice PARK concurred.

Mr. Justice VAUGHAN.—That possession is prima facie evidence of property, is not denied. But here, the title of the assignees being admitted on the pleadings, the only question at issue between the parties was, whether or not the plaintiff had become lawfully possessed of the goods.

Mr. Justice BOSANQUET.—The proceedings under the commission stand admitted on the record; consequently, the only question at issue between the parties was, whether

izes for the county of Stafford, it appeared that the endant, who was a minor, in low circumstances, took premises in question (a house containing five rooms, on the ground floor, one of which the defendant occied as a shop, the other to reside in; and three rooms ve, which he underlet) at the yearly rent of 15*l.*, for the rpose of carrying on therein the business of a barber, which trade he had served a regular apprenticeship; at the defendant occupied the house from Midsummer, 32, to Michaelmas, 1833; and that rent was in arrear r nearly the whole of that period. The defence was, at the defendant was an infant, and by law incapable of rrying on a trade or of taking a house for that purpose, ough he might contract for necessary lodging. The rned judge directed the jury to this effect, and left it to em to say whether or not the house above described was cessary to the defendant, and such as an infant could ntract for. The jury found for the defendant.

Mr. *Godson*, in Hilary Term last, obtained a rule nisi for new trial, on the ground of misdirection. He cited myns's Digest, "Enfant," (B. 5), where it is said that a ntract by an infant for necessaries for his family, *if he a housekeeper*, is good; and *Kirton* v. *Eliott*, 2 Bulst. where it was held that an action will lie against a party rent in arrear upon a lease made to him during his incy: and he submitted that the defendant was not a der, but merely exercised a manual occupation.

Mr. *Talbot* shewed cause.—In Rolle's Abridgment, "Ents," (K), *Kirton* v. *Eliott* is mentioned by the name of *ettle* v. *Eliot*, and it there appears that the party's liaity arose from his continuance in the occupation of the emises after he became of age. *Ketsey's* case, Cro. Jac. 20, and *Evelyn* v. *Chichester*, 3 Burr. 1717, are to the me effect. The distinction suggested between the car-

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LOWE v. GRIFFITH.

rying on of a trade and the exercise of a mere manual occupation, is fallacious. The question here is concluded by the finding of the jury that the house was not of a description to be necessary for the residence of an infant in the station of life of this defendant.

Mr. *Godson*, in support of his rule.—The defendant was bound to exercise his calling for his support (*a*). It follows, therefore, that he may lawfully contract for sufficient place for that purpose. The defendant was not a trader. The only question is whether, it being clear that an infant may contract for lodging (*Lloyd* v. *Johnson* and *Crisp* v. *Churchill*, 1 B. & P. 340), the moderate priced tenement occupied by this defendant does or does not fall within the reasonable limit of the term necessaries, regard being had to all the circumstances.

Lord Chief Justice TINDAL.—I see no reason for disturbing this verdict. An infant can neither trade nor contract for the hire of a place for the carrying on of a trade. But it is said that this defendant was not a trader, and that he hired the house to enable him to exercise his manual occupation of a barber. Still the question would

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WILKINSON *v.* OLIVEIRA.

Tuesday, Jan. 27th.

The declaration stated, that, in consideration that the plaintiff at the request of the defendant had given the defendant a certain letter by means of which he was enabled to end disputes and differences that had arisen between himself and third parties, and to recover certain property, the defendant promised to give the plaintiff 1000*l.*:—Held, that this declaration disclosed a sufficient consideration for the defendant's promise.

claration stated that divers disputes and differ-
arisen between the defendant and divers other
specting the disposition of the estate and effects
Oliveira then late deceased, and the right of the
to the possession of any and what part thereof,
disputes and controversies it became and was
for the termination thereof in favour of the de-
ıat the defendant should prove that the said D.
as at the time he made his will and at the time
h an alien and a native of Portugal; that the
as lawfully possessed of a certain writing and
ng a letter written by the said D. Oliveira in his
the plaintiff, which said letter shewed, declared,
d that the said D. Oliveira was at the time he
will and at the time of his death an alien and a
'ortugal; that the plaintiff, at the request of the
gave to the defendant the said letter, to be
employed by the defendant for the purpose of
at the said D. Oliveira was such alien and na-
ırtugal at the time he made his will and at the
ı death; that the defendant used and employed
:tter for the said purpose; and that, by means
letter and of the matters therein contained, the
was enabled to and did cause the said disputes
versies to be determined in favour of him the
and did by means of the said letter and of the
erein contained become lawfully possessed of
red a large portion of the estate and effects of
. Oliveira, of great value, to wit, of the value of
and thereupon afterwards, to wit, on &c., in
ion thereof, and that the plaintiff at the special
ıd request of the defendant had then and there
ıaid letter to the defendant, the defendant then

1835.

WILKINSON v. OLIVEIRA.

and there undertook and faithfully promised the plaintiff to give him, the plaintiff, a certain sum of money, to wit, the sum of 1000*l.*—Breach—non-payment of the 1000*l.*

The defendant pleaded, that he was not by means of the said letter enabled to, and did not by means thereof, cause the said disputes to be determined in favour of him the defendant; and that he did not by means of the letter become possessed of a portion of the estate of D. Oliveira of the value of 100,000*l.*

To this plea the plaintiff demurred specially, assigning for cause, that it put in issue matter not properly issuable, and did not deny or confess and avoid the breach of promise.

The defendant joined in demurrer.

Mr. *Kelly*, in support of the demurrer, contended that the delivery of the letter at the defendant's request was ample consideration for the defendant's promise to pay the plaintiff 1000*l.*; and that the plea afforded no answer whatever to the declaration.

Mr. Serjeant *Talfourd*, contra, submitted that a mere

1835.

Thursday, Jan. 29th.

To induce the court to discharge a defendant from an arrest on the ground of no debt being due, the circumstances must be exceedingly strong to shew that the arrest is an abuse of the process of the court.

TUCKER *v.* TUCKER.

endant was held to bail at the suit of the plain-
:er, for the balance of an account alleged to be
im to her for board and for money paid by the
ıe use of the children of the former from the
:o 1823.

eant *Wilde*, on the part of the defendant, mo-
ıle calling on the plaintiff to shew cause why
ınt should not be discharged out of custody on
:ommon appearance. The motion was founded
idavit stating that the supposed debt, if any,
by the statute of limitations; and that there
o subsequent acknowledgement or promise to
t set out a receipt signed by the plaintiff and
ne, 1827, for 24*l.* the balance of account between
; and also a letter dated in the month of Octo-
which the plaintiff solicited from the defendant
ırty shillings. The learned Serjeant cited the
etich v. *Bonacich*, 5 B. & A. 904: there a plain-
before his making an affidavit of debt, had writ-
stating that the defendant was a creditor of his;
ırt interfered summarily to discharge the de-
: of custody, on affidavits denying the debt, the
: having negatived the writing of such letter by
ged that the debt due to him had arisen sub-
o it: and also *Masel* v. *Angell*, 6 D. & R. 15,
. *M'Curling*, 6 D. & R. 24, and *Burton* v. *Ha-*
v. & M. 318, to shew, that, although the courts
us of trying the merits on affidavits, yet they
ıse where it is clearly and manifestly shewn
fendant has been holden to bail for a debt not

ief Justice TINDAL.—The court can hardly be

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too strict in its adherence to the general rule, not to prejudge a case. In acceding to this application, I am influenced by a hope, considering the relation in which the parties stand towards each other, that the matter may when they are before us be put in a train for a speedy investigation, rather than by any opinion that the rule will ultimately be made absolute.

Rule granted.

The matters in difference between the parties were ultimately referred to the prothonotary.

Tuesday, Jan. 13th.

DOE *d.* PUGH *v.* ROE.

Service of a declaration and notice in ejectment upon a servant of the tenant upon the premises, is not sufficient, unless the servant makes affidavit (or it otherwise appears) that they came to the tenant's hand (*a*); or, where this cannot be procured, unless considerable diligence be shewn to have been used to serve the tenant personally.

MR. *W. H. Watson* moved for judgment against the casual ejector (*b*), upon an affidavit stating that the tenant

(*a*) See Doe *d.* Thomas *v.* Roe, [redacted] of the premises, then to affix [redacted]

held the premises under a lease for twenty-one years ı the 29th March, 1819, at the yearly rent of 80*l.* pay- quarterly, with a clause of re-entry in case of non- nent thereof; that a year's rent was in arrear, and that e was no sufficient distress to be found upon the pre- ɜs to countervail the same; that a person went to the nises to serve the tenant with the declaration and no- , and saw a female servant there, who said the tenant from home; that the same party called again, the ınt still being absent, and served the declaration and ce upon the servant, explaining them to her; that she rwards said she had delivered them to the tenant; but t, when the party went to the premises again in order procure an affidavit of the servant to that effect, she not to be found; and that the declaration and notice ɜ duly affixed upon the door of the premises (*c*).

ER CURIAM.—We think enough has not been done in present case to satisfy the court that the premises are rted, within the meaning of the statute, so as to entitle essor of the plaintiff even to a rule nisi. Another at- t must be made to serve the tenant or to get an affi- from the servant that the declaration has been de- ed to him.

Rule refused (*d*).

the trial in case the defen- appears, that half a year's was due before the said decla- was served, and that no suf- t distress was to be found on emised premises countervail- he arrears then due, and that essor or lessors in ejectment power to re-enter; then and every such case the lessor or sors in ejectment shall recover dgment and execution in the me manner as if the rent in ar- rear had been legally demanded and a re-entry made."

(*c*) See forms of the affidavit in Tidd's Appendix to the 9th edit. of the Practice, c. xlvi. ss. 40, 41. This affidavit may be made by a receiver—Anon. 3 M. & Scott, 751. The affidavit that there is no sufficient distress on the premises must be positive; the deponent's belief will not do. Doe *v.* Roe, 2 D. P. C. 413.

(*d*) When the tenant absconds

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Saturday, Jan. 17th.

In a writ of right, declarations of a deceased occupier of the premises demanded, that he held them as tenant to the person under whom the demandant claims, are admissible (valeant quantum) to shew seisin in that person.

CARNE, Demandant, NICOLL, Tenant.

THIS was a writ of right, tried at bar. One of the knights not appearing, the cause was allowed to proceed without him, both sides consenting, and his name being suffered to remain as if he had been present, that there might be no error on the face of the record.

The demi-mark had been tendered at the joining of the mise, and was again tendered and paid into court before the swearing of the grand assize.

Mr. Serjeant *Wilde* suggested that the grand assize should be sworn first to try the seisin of the demandant as alleged in his count, the tenant being by having tendered the demi-mark entitled to call upon the demandant to be-

or keeps out of the way to avoid being served, a copy of the declaration should be delivered to his relation or servant or some other person on the premises, to whom the notice should be read over and explained, and another copy affix-

claration had called at his house in the morning and again in the evening, and, not finding him either time at home, nailed the declaration upon the most conspicuous part of the premises, this was not deemed sufficient even for a rule

ing such seisin. It was not very much insisted as it argued, or noticed by the court (*a*).

administered to the grand assize was as folbeing sworn separately:—" I, A. B., do swear say the truth whether Charlotte Nicoll hath right to hold the tenements which Thomas nds against her by his writ of right, or the said rne to have them as he demandeth, and for et to say the truth—So help me God."

ke, the junior counsel for the demandant, d Mr. Serjeant *Wilde* (with whom was Mr. or the tenant, stated the case to the jury, and sses and produced documentary evidence to e tenant's title.

ant *Merewether* and Mr. *Smirke*, for the delled (amongst others) a witness named Scott, a e age of seventy-seven, who deposed to certain made in her presence, in or about the year person of the name of Raine who was in pos-

form of the oath in on 514, and also in en v. Clarke, 3 Wils. :. Lofft, 496, 2 Sir And see the authori- in the notes to the dem., Morris, ten., 118; from whence : in the majority of s the tender of the s held to have the pelling the demanand, although in the both, dem., Bagwell, Moore, 349, 2 Car. and Spires, dem., ie tenant commencding his having tendered the demi-mark, it would seem from the mode in which the grand assize were charged in these two, as in all the other cases, that such was not the antient course; for, it has invariably been left to them first to determine whether or not the *demandant has proved the seisin alleged in his count.* If this question be found in the affirmative, then the next inquiry is *whether the demandant or the tenant have shewn the better mere right:* if the first question be negatived, the grand assize are discharged, and all the inquiry and exposure of the tenant's title become gratuitous and unnecessary.

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session of the premises sought to be recovered, to the following effect, viz. that he Raine held the premises as tenant to one John Carne (an ancestor of the demandant, and under whom he claimed), and that he had asked Carne to repair them, but that Carne had refused to do so, but desired him, Raine, to do the necessary repairs, and to pay such rent for the premises as he thought he could afford. It did not however appear that any rent ever had been paid.

Mr. Serjeant *Wilde* objected that this, though good evidence of a disclaimer by Raine of title in himself, was not evidence to the extent for which it was offered, viz. to prove affimatively that a particular individual was the landlord—in the former case, the declarations being only admitted as evidence on the ground of their being against the interest of the party at the time of making them; whereas, in the latter, it is not against his interest to declare under which of two contending parties he holds. The foundation of the rule gives its limit.

Mr. Serjeant *Merewether*, contra, submitted that the fact of the declarations being against the interest of the

that time, that he held as tenant to the devisor, were admissible evidence to prove the seisin of the devisor. And in *Peaceable* d. *Uncle* v. *Watson*, 4 Taunt. 16, the declarations of a deceased occupier of land, as to the party under whom he held, were holden to be admissible evidence of seisin in that person. These two cases seem to me to decide the point. What weight the evidence will be entitled to when admitted, is another question.

Mr. Justice BOSANQUET.—I have always understood that declarations of a *deceased* tenant as to who was his landlord, are good evidence; though a tenant in possession is not a good witness to support his landlord's title, or to prove anything connected with it, because it would tend to uphold his own possession—*Doe* d. *Foster* v. *Williams*, Cowp. 621, *Doe* d. *Winckley* v. *Pye*, 1 Esp. 364.

The rest of the court concurring, the evidence was accordingly received.

Lord Chief Justice TINDAL ultimately left it to the jury to say whether there was such a possession proved in the person under whom the demandant claimed as to warrant them in presuming a fee in him, within sixty years.

The jury found in the negative.

Verdict for the Tenant.

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Saturday, Jan. 24th.

The defendants, bankers, discounted for B., a customer, two bills, one of which was accepted by L. for B.'s accommodation, and the payment of the other guaranteed by L., due respectively the 8th and 10th of January. On the 3rd January, B., who was in a state of insolvency, went to the defendant's banking-house, accompanied by L., and paid in to his account with them a sum sufficient to cover the two bills, and then drew and gave to L. two cheques for the

ABBOTT and Others, Assignees of BAKER, a Bankrupt, v. POMFRET and Others.

THIS was an action of assumpsit for money had and received, brought by the plaintiffs as assignees of one Baker, a bankrupt, to recover from the defendants a sum of 200*l.* alleged to have been paid by him to them in contemplation of bankruptcy, and with a view fraudulently to prefer them to the rest of his creditors.

The cause was tried before Mr. Justice Littledale at the last Summer Assizes for the county of Sussex. The facts were as follow:—Baker had carried on the business of a grocer at Rye. The defendants were bankers residing at the same place. Towards the close of the year 1832, Baker's circumstances became embarrassed to such a degree as to compel him to dispose of his business and stock. The sale took place on the 2nd December. Messrs. Pomfret & Co. (the defendants) had discounted for Baker two bills, one for 184*l.* 2*s.* 4*d.* accepted by one Lawrence, due on the 8th January, 1833, the other for 200*l.* accepted by one Mills, and due on the 10th January, 1833. Lawrence

y way of fraudulent preference. Acting on the authority f the case of *Guthrie* v. *Crossley*, 2 Car. & P. 301, Mr. aron Parke on that occasion held that the plaintiffs were ntitled to recover the amount of the bill for 184*l.* 2*s.* 4*d.*, which Lawrence was proved to be a party, but not of at for 200*l.*, with which he was not shewn to have any onnection. The plaintiffs thereupon sued the present efendants for the 200*l.*

The learned judge nonsuited the plaintiff, on the ground at the payment by Baker to Lawrence did not constitute fraudulent preference of the defendants.

Mr. Serjeant *Spankie*, in Michaelmas Term last, obtained a rule nisi to set aside the nonsuit and enter a verict for 200*l.*, pursuant to leave reserved at the trial.

Mr. Serjeant *Wilde*, Mr. *Thesiger*, and Mr. *Channell*, hewed cause.—The fact which the plaintiffs omitted to rove in the action against Lawrence, viz. his liability in espect of the 200*l.* bill, was proved in this case: for the 84*l.* 2*s.* 4*d.* he was liable as acceptor, for the 200*l.* as uarantie. In *Guthrie* v. *Crossley*, a trader stopped payent generally on the 5th January, and, on the evening f the 6th, sent a 100*l.* note to a particular creditor, saying it was to help him over his payments: it was held, hat, such trader afterwards becoming a bankrupt, his asignees might recover the money, although at the time of ayment a bill for a larger amount was becoming due, which ad been accepted by the creditor for the bankrupt's accommodation, and for which he had promised to provide; nd that the creditor could not be considered as the agent f the bankrupt to pay the money for the bill, because, he eing a party to it, the payment operated pro tanto in his ischarge.—The first question however is, whether there any evidence that Baker at the time of making the payent had it in contemplation that his embarrassments must

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terminate or were like to terminate in bankruptcy: and, if so, the next question will be whether he intended to benefit or prefer the defendants or Lawrence.—In *Morgan* v. *Brundrett*, 2 Nev. & M. 280, 5 B. & Ad. 289, it was held that a preference by an insolvent trader to a particular creditor is not fraudulent, if originating bonâ fide in the urgency of the creditor; as it is necessary, in order to avoid it, to shew a contemplation of bankruptcy as well as insolvency. In *Wheelwright* v. *Jackson*, 5 Taunt. 109, 633, 2 Rose, 127, a creditor obtained a preference in contemplation of an intended deed of composition, which would be fraudulent as against the creditors under that deed: the composition going off, it was determined that the creditor might retain his securities against a commission subsequently issued and not contemplated at the time of giving the preference. In *Belcher* v. *Prittie*, 10 Bing. 408, 4 M. & Scott, 295, Mr. Justice Park observes that the cases on the subject of fraudulent preference have been carried too far: and the like opinion is expressed by all the judges in *Morgan* v. *Brundrett*.—But the more important question here is, whether it was the intention of the bankrupt to prefer the defendants or to prefer his

bills and paid B. by a cheque on his bankers: it was held that this payment was protected by the 6 Geo. 4, c. 16, s. 82, against the assignees under a commission issued subsequently to such payment, on the antecedent act of bankruptcy. That is precisely applicable to the present case.

Mr. Serjeant *Spankie* and Mr. *Platt*, in support of the rule.—It is perfectly clear, that, at the time the payment in question was made, Baker was in a state of complete and hopeless insolvency, and must have known that bankruptcy was the probable and almost the necessary result. The defendants, the bankers, held two bills due respectively the 8th and 10th of January, accepted by Lawrence and by Mills for the bankrupt's accommodation. On the 3rd, five days before the first of these securities became due, the amount was paid and the bills withdrawn from their hands by Baker. That Baker contemplated a fraudulent preference of some one, is beyond doubt: whether the defendants or any other persons were the objects immediately in his comtemplation, is perfectly immaterial; the mischief, viz. the dilapidation of the bankrupt's estate, is the same, and the transaction is equally against the policy of the bankrupt law. The defendants were the parties benefited: they received the money, instead of being put to the uncertain issue of actions against Lawrence on his guarantie, or against Mills on his acceptance.

Lord Chief Justice TINDAL.—The argument urged on the part of the plaintiffs in this case has proceeded on the same footing as if the transaction out of which the action arises had taken place after the act of bankruptcy; for, it is contended that the plaintiffs are entitled to recover upon the ground of a fraudulent preference. The property in question never passed by the assignment to the assignees of Baker: the only ground therefore upon which the plaintiffs can found their right to sue, is, that the payment they seek

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to disturb was made by Baker with intent fraudulently to prefer the defendants, and in contemplation of bankruptcy. I have never understood that there may be a fraudulent preference of one in a payment made to another. In cases of fraudulent preference, we must always look to the relation in which the parties stand towards each other, and the probable motives by which they may be influenced. It is said that if, in order to give a fraudulent preference to A., the bankrupt makes a payment to B., the latter may be sued by the assignees. No authority is cited for this position; and I think it would be carrying the rule as to fraudulent preferences an alarming step further than it has already obtained. The only question seems to me to be, whether or not the bankrupt in making this payment contemplated a fraudulent preference of the defendants. I can see no such evidence on the learned judge's notes. It appears that the bankrupt, Baker, had procured the defendants, who were his bankers, to discount for him two bills of exchange, the one for 184*l.* 2*s.* 4*d.*, due on the 8th, the other for 200*l.* due on the 10th January, 1834; that, just before these bills became due, viz. on the 3rd January, Baker paid into the defendants' hands

therefore, one can see a motive for Baker's preference of Lawrence before the rest of his creditors: but I can discover no motive for his preferring the present defendants. There is no ground whatever for imputing to them that they were the objects of a fraudulent preference. It seems to me that the plaintiffs have put their own seal upon the transaction. They have already sued Lawrence, and have recovered against him the amount of one of the bills: and the only difference in Lawrence's position in respect of the two bills was, that, as to the one his liability was direct, as to the other collateral; but still he was ultimately liable for both. The whole question, therefore, seems to me to resolve itself into this, whether Baker's intention was to prefer his friend Lawrence or the defendants. That his intention was to prefer Lawrence, there is abundant evidence: and there is, as it seems to me, no evidence whatever of an intention to prefer the defendants. If, indeed, any such intention existed, the most simple and effectual course on the part of Baker would have been, to pay the money into the bank, and there let it remain until the bills became due. All the rest would be useless ceremony. For these reasons I think there is no ground for setting aside the nonsuit.

Mr. Justice PARK.—I am of the same opinion. The plaintiffs seem never to have though to sue the present defendants, until they were defeated as to part of their claim in the action against Lawrence, who clearly was the person in whose favour Baker contemplated a preference, if any were intended.

Mr. Justice VAUGHAN.—I see no difficulty in applying the rules of law upon the subject to the present case. The nonsuit proceeded on the ground that the plaintiffs failed in establishing the steps requisite to support the action—the insolvency of Baker, the fact that he contemplated

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bankruptcy, that the payment was made by him with intent fraudulently to prefer one of his creditors to the general body, and that the money found its way into the hands of the defendants. No doubt, Baker, at the time he made the payment, was in a state of insolvency, and must have contemplated his bankruptcy to be inevitable: and the only question is whether the payment was a fraudulent preference of the defendants. It seems to me to be the result of the evidence, that Lawrence was the party intended to be benefited by the payment of the bills: he was a party to one, and guarantee of the other; in five days the loss would fall upon him; and he was the party that went with Baker to the banking-house. One can readily find a motive for the bankrupt's preference of Lawrence; but who can suggest a probable motive for his preferring the defendants? The money was paid into their hands in the ordinary course of a banker's business. Cheques were drawn, and they were bound to pay them in course. I therefore concur with the court in thinking that there is no ground for disturbing the nonsuit, and consequently the rule that has been obtained for that purpose must be discharged.

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t of Lawrence alone. If Baker neither intended to · nor did actually confer a benefit on the defendants ing the money, they are clearly entitled to retain it.

Rule discharged.

EBB, Assignee of WALTER, an Insolvent Debtor, v. WEATHERBY.

Wednesday, Jan. 28th.

To a declaration in assumpsit by the assignee of an insolvent debtor, for goods sold &c., the defendant pleaded that he paid a certain sum in full satisfaction and discharge of the promise in the declaration, and that the insolvent accepted and received the same in full satisfaction and discharge. The plaintiff replied that the defendant did not pay the insolvent the sum mentioned in full satisfaction and discharge, nor did the insolvent accept and receive the same in full satisfaction and discharge:—Held, good, on special demurrer.

S was an action of assumpsit for goods sold and de- l and lodging provided by the insolvent, and on an ıt stated with him, before his insolvency.

as—first, the general issue—secondly, as to the sum 8*s.* 2*d.*, parcel of the sums in the declaration men- , that, after the making of the promise in the decla- mentioned as to that sum, and before Walter be- insolvent, to wit, on &c., the defendant paid Walter m of 3*l.* 8*s.* 2*d.* in full satisfaction and discharge of id promise by him the defendant made in respect of id sum of 3*l.* 8*s.* 2*d.* and of the damage sustained by :r by reason of the non-performance of the said pro- ıs to that sum; and that Walter accepted, had, and ed of the defendant the said sum of 3*l.* 8*s.* 2*d.* in full ction and discharge of the said promise in respect of id sum of 3*l.* 8*s.* 2*d.* and of the damage sustained by :r by reason of the non-performance of the same pro-

: plaintiff joined issue on the first plea, and to the l replied, that the defendant did not pay Walter the ım of 3*l.* 8*s.* 2*d.* in full satisfaction and discharge of id promise by the defendant so made as aforesaid in :t of the said sum of 3*l.* 8*s.* 2*d.* and of the damage ıed by Walter by reason of the non-performance of me promise as to that sum; nor did Walter accept,

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have, and receive of the defendant the said sum of 3*l.* 8*s.* 2*d.* in full satisfaction and discharge of the said promise in respect of the said sum of 3*l.* 8*s.* 2*d.* and of the damage sustained by Walter by reason of the non-performance of the same promise, in manner and form as the defendant had in his last plea in that behalf alleged: and this &c.

The defendant demurred, assigning for causes—that the issue attempted to be raised by the replication was multifarious and complex, inasmuch as the replication had not merely denied that the defendant paid Walter the said sum of 3*l.* 8*s.* 2*d.*, but also that Walter accepted, had, and received the same of the defendant in full satisfaction and discharge of the said promise as to the said sum of 3*l.* 8*s.* 2*d.* and of the damage sustained by the said Walter by reason of the non-performance of the said promise; both of which facts were material, and either of which would be sufficient to bar the plaintiff from maintaining his action against the defendant; and also for that both of the said facts constituted distinct and different propositions.

The plaintiff joined in demurrer.

Mr. *Chandless*, in support of the demurrer.—The repli-

cord and satisfaction. Payment of a less sum than the demand has been held to be no satisfaction in the case of a liquidated debt; but, where the debt is unliquidated (as here), it is sufficient—*Wilkinson* v. *Byers*, 1 Ad. & El. 106, 3 N. & M. 853.

Mr. *Theobald*, contra, was stopped by the court.

Lord Chief Justice TINDAL.—In the form in which this plea is put upon the record, it appears to me not to be a plea of accord and satisfaction, but a plea that the insolvent, Walter, received a certain sum in satisfaction of his demand; and I think in the statement that the plaintiff received it in satisfaction is virtually implied that the defendant gave the money in satisfaction. I therefore do not see that the defendant is in any way prejudiced by the plaintiff's taking issue in his replication on both parts of the allegation, the first part being necessarily involved in the second. This is by no means new: for, in *Peytoe's* case, Lord Coke, after stating what an accord and satisfaction is, adds (9 Rep. 80. b.)—" Nota, reader, the best and most secure form of pleading of an accord, is, to plead it by way of satisfaction, and not by way of accord; for, if he pleads it by way of accord, he ought to plead the precise execution thereof in the whole, and, if he fails of any part thereof, his plea is insufficient; but, by way of satisfaction, he shall plead no more than that the defendant paid the plaintiff 6*l.* 10*s.* in full satisfaction of the same action, which the plaintiff received &c." Now, it is undoubtedly true, as appears by *Pinnel's* case, 5 Rep. 117. a., that it would be a good replication to this plea to take issue on either allegation. But we are called upon to say, that, by taking issue on both, the plaintiff throws a difficulty on the defendant. In *Young* v. *Rudd*, 5 Mod. 86, to an indebitatus assumpsit, the defendant pleaded in bar that he gave the plaintiff a beaver hat, which the latter

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accepted in satisfaction of the debt; the plaintiff replied by protestation that the defendant did not give the hat in satisfaction, and traversed that he accepted it in satisfaction: and upon demurrer it was held that the replication was good. The court said: "Where a thing is pleaded by way of *concord*, it is issuable; but, if the concord is not executed by giving and receiving, it cannot be pleaded in bar to the action: therefore, the best way of pleading it is, by setting forth that the thing was given, and given in the full satisfaction &c., according to the resolution in *Pinnel's* case. But both are traversable; as, for instance, the condition of a bond was (Hob. 178), that, if the defendant *compounded* with one Earle for his lands, then he should pay the plaintiff 30*l.*: in an action of debt brought on this bond, the defendant pleaded that he had not made any composition with Earle &c.: the plaintiff replied that Earle did grant a rent-charge in fee to the defendant in satisfaction of his title; and so he made a composition: the defendant, protestando that Earle non concessit, pro placito dicit that he did not accept it in satisfaction: and it was adjudged a good plea, without traversing the grant; for, as in that case there could not be any composition without

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issue taken upon the acceptance in satisfaction, does virtually involve in it an inquiry as to whether or not the payment was made in satisfaction. Without, therefore, at all impugning any of the older cases, and upon the authority of *Pinnel's* case and the judgment of the court of King's Bench in *Young* v. *Rudd*, I think the plaintiff in this case is entitled to judgment.

The rest of the court concurring—

Judgment for the plaintiff.

LEUCKHART *v.* COOPER and Another.

Friday, Jan. 30th.

In trover for wools—the court allowed the defendants to plead—1. The general issue—2. A custom for warehousekeepers to have a general lien upon goods deposited with them for monies expended upon them and for their general balance; and that the wools were housed with them by one H., who was indebted to them on a general balance—3. A general lien as against H., by a special agreement—4. That H. was enabled by the consignor of the wools to hold himself out as the owner, and deposited them with the defendants upon the custom set out in the second plea—5. That the wools were consigned by the plaintiff to H. as their agent; and that H. employed the defendants to land and house them, and pay the duties &c.; and claiming a lien as in the second plea.

THIS was an action of trover brought to recover the value of certain wools.

Mr. *R. V. Richards*, for the defendants, obtained a rule to plead the several matters following:—First, not guilty.—Secondly, that the defendants were public uptown warehousekeepers; that, in the course of carrying on their trade, the defendants were employed by merchants and others in London to enter at the Custom-House and afterwards to land and house goods consigned, for reward, the defendants paying the duties and also the freight and other charges if required; that there is an ancient custom in the trade of public uptown warehousekeepers in London, for all such warehousekeepers to have a general lien upon all goods housed or remaining in their warehouses for all monies or any balance thereof, &c.; that the defendants were retained by one Heilbronn to enter at the

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Custom-House of London wools consigned to Heilbronn from abroad, and afterwards to land and house the same in the warehouses of the defendants in the name of Heilbronn, subject to his order, the defendants paying the freight and duties on the wools; that the defendants did accordingly enter, land, and house the wools in question in the name of Heilbronn, and pay the freight and other charges thereon, to the amount of 2000*l.*, and that 1030*l.* 13*s.* 5*d.* thereof remained due to the defendants; that the defendants delivered to the order of Heilbronn all the wools with the exception of eleven bales, which remained in their warehouses, and which they held as and by way of lien for the said 1030*l.* 13*s.* 5*d.*

Thirdly—That the defendants were public uptown warehousekeepers in London; that, in the course of their trade, they were employed by Heilbronn to enter at the Custom-House in London wools consigned from abroad, and afterwards to land and house the same in their warehouses for and in the name of Heilbronn, and subject to his order, for reward, they the defendants paying the freight and duties; that Heilbronn, in order to induce the defendants to continue to enter wools consigned from abroad and afterwards to land and house the same in their warehouses in manner and upon the terms last aforesaid, and to give Heilbronn credit for all advances which the defendants should make in respect thereof, by a memoran-

pay the duties and freight, and afterwards land and e the goods in their warehouses in the name of Heil- n and subject to his order—concluding as before.

urthly—after commencing and setting forth the cus- s in the second plea—that Heilbronn received wools gned from abroad, and was in possession of twelve of lading of the said wools, deliverable to order, by he was enabled to hold himself out as the true of the wools; that Heilbronn delivered the last- oned bills of lading to the defendants, and employed to enter the wools and to land and house the same eir warehouses in his name and subject to his order, paying the duties, freight, &c.; that the defendants ccordingly enter the said wools and afterwards land house them in the name of Heilbronn and subject to rder—concluding as before.

ifthly—commencing as in the fourth plea—that the ntiff was a merchant carrying on business at Franken- sen, in Saxony, and that Heilbronn was the agent ng for the plaintiff in London; that the plaintiff con- ed to Heilbronn wools from abroad to be by him as plaintiff's agent entered at the Custom-House, and for ilbronn afterwards to land the same for and on account he plaintiff, paying or causing to be paid all necessary ies and charges on account of the plaintiff; that Heil- nn, as the plaintiff's agent, employed the defendants as h public warehousekeepers to enter at the Custom- use on account of the plaintiff divers bales of wool, and rwards to land and house the same, they paying the ies &c.; that the defendants did accordingly enter the ls at the Custom-House for and on account of the ntiff, and did pay the duties and also the freight and r charges, at the request of Heilbronn, and did after- ds land and house the wools on account of the plain- subject to the order of Heilbronn as his agent—con- ing as before.

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Mr. *W. H. Watson* shewed cause.—The general issue is idle (*a*), and all the other pleas contain substantially the same defence, and therefore ought not all to be allowed. The defendants must rely either on the custom or on the express agreement under which the wools were deposited with them. By the 5th of the first general rules and regulations of Hilary Term, 4 Will. 4, it is provided that several pleas &c. shall not be allowed, "unless a distinct ground of answer or defence is intended to be established in respect of each:" and amongst the examples given by way of illustration of the rule, is the following—"pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed." [Lord Chief Justice *Tindal*.—If you mean to take issue on the custom, all the pleas will not be allowed: but, if you also traverse the right of the party depositing the wools, then the pleas would seem to raise substantially different defences.] The second and fourth at all events are not both necessary; they set up the same custom with a slight variation; and if it should happen that there is any variance between the custom set out and that proved, the record may be amended at the trial under the statute

upon them; and alleges that the wools were housed with the defendants by one Heilbronn, who was indebted to them on a general balance. The second sets up an agreement between Heilbronn and the defendants, giving the latter a lien on all goods deposited by him with them for advances made to him; and the other two pleas set up the same custom and lien as upon a delivery by different persons. I must confess I do not see with sufficient certainty and clearness that the same defence substantially is contained in any two or more of these pleas, to induce me to say that the defendants ought to be deprived of the benefit of the statute of Anne.

Mr. Justice BOSANQUET.—I am not sufficiently satisfied that the several pleas here sought to be put upon the record are mere variations of the same defence, and not different defences in substance. The plaintiff will be in no degree prejudiced by this decision; for, he may, if it shall appear at the trial that no distinct ground of answer or defence in respect of each plea was bonâ fide intended to be established, apply to the judge who tries the cause to certify to that effect; and then the defendant, even if he succeeds upon any issue arising out of any plea in respect of which the judge may certify, will have no costs (*b*).

The rest of the court concurring—

Rule absolute.

(*b*) See rule 7 of the "first rules and regulations" of Hilary Term, 4 Will. 4.

BRYDGES *v.* FISHER.

Friday, Jan. 30th.

The discretion as to the costs of a commission for the examination of witnesses out of the jurisdiction, given to the courts by the statute 1 Will. 4, c. 22, s. 3, will be regulated by the same principles upon which the courts of equity proceeded in like cases before the passing of that statute, or by the practice that obtained with respect to the costs of a mandamus under the 13 Geo. 3, c. 63, s. 44.

THIS was an action on the case against the defendant for the misappropriation of money that had come to his

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hands under the following circumstances:—The plaintiff and one Macdonald had been appointed commissioners for the distribution of certain prize-money. The defendant was their clerk, in which capacity he was intrusted to draw cheques in favour of the parties entitled, a list of whom was furnished to him. In violation of his duty (as the plaintiff alleged), the defendant, at the instigation of Macdonald, drew cheques in favour of persons not named in the list, in the whole amounting to 3779*l.* 18*s.* 4*d.* This sum the plaintiff had been compelled to restore. The plaintiff having omitted in his particular of demand to give credit for a sum of 2000*l.* received from Macdonald, and the defendant conceiving it to be important that he should be in a situation to prove at the trial that this last-mentioned sum was received with the knowledge of the plaintiff—the defendant obtained a commission under the 1 Will. 4, c. 22 (*a*), for the examination of Macdonald, who had since the commencement of the action gone to reside at St. Omer's. The plaintiff did not join in the commission, but Macdonald was cross-examined on his behalf under it. The deposition thus obtained was not given in evidence at the trial. A verdict having been

in any action at law depending in either of the superior courts at Westminster, and of the proceedings thereon, shall be in the discretion of the court issuing the same (*b*)." This action is brought against the defendant to recover damages for a misapplication by him of funds entrusted to him for a specific purpose. The defence set up was, that the defendant acted in obedience to the orders of Macdonald. Under such circumstances, Macdonald would not have been a competent witness if here; his examination under the commission therefore would be likewise inadmissible. He was deeply interested in the result of the cause; being under a general liability to indemnify the defendant: it was his act that the defendant was bound to justify. In protecting the defendant, therefore, he was concealing his own misconduct. There are two grounds of objection to the competency of a witness; the one, that the verdict or judgment in the action in which it is proposed to examine him would be admissible in evidence for or against him in any subsequent action; the other, that he is interested in the result of the suit—liable to another action in the event of the cause one way. [Mr. Justice *Bosanquet*.—Is this a liability that would be capable of being given in evidence against Macdonald independently of the verdict in the present action?] The verdict in the present case (supposing it to have passed for the plaintiff) would be evidence of the amount of damage in an action by Fisher against Macdonald; but not the *only* evidence. The whole circumstances of the case shew that the defendant was the party for whose sole benefit the commission issued; and therefore he alone should bear the expense. Besides, a bill for a discovery had been filed by the defendant, under which he would have obtained all that he sought by the examination of Macdonald. [Lord Chief Justice *Tindal*.—

(*b*) See Rex v. The Lord of the Manor of Oundle, 1 Ad. & E. 299, n.

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The defendant was not bound to rest contented with the answer of the plaintiff.]

Mr. Serjeant *Adams* and Mr. *Nicholl*, in support of the rule.—Macdonald was not directly interested in the issue of the question between the parties to the present suit. The verdict could not be evidence either for or against him. [Lord Chief Justice *Tindal*.—It would undoubtedly be one of the steps to prove the extent of the damage in an action by Fisher against Macdonald, if the verdict had passed against the former.] At all events, by cross-examining Macdonald, the plaintiff must be taken to have waived all objection to his competency. [Lord Chief Justice *Tindal*.—That is not so, for the competency could not come in question till the examination was offered at the trial.] The objection ought to have been urged at the time the commission was moved for.

The cross-examination by the adverse party of a witness examined by commission is no ground for charging him with the costs.

Lord Chief Justice TINDAL.—I am of opinion that it is unnecessary for us to discuss the question whether Macdonald would have been a competent witness or not, either on the ground that the record would be evidence for or against him in another action, or on the ground of interest

the costs of which are by the 3rd section placed in the discretion of the court issuing the same. When called upon to exercise this discretion, the first point for us to consider is, how the costs were paid before the passing of the act in question. The universal practice on applications to a court of equity, was, that the party obtaining the commission himself paid the costs of it. The granting the commission was considered a boon to him, and a detriment to the other party. Therefore it seems to me that this is a discretion to be carefully watched. Now, looking at the circumstances of the present case, it seems to me that the defendant might have had a very great advantage in having the witness examined without bringing him before the jury. The defendant was formerly Macdonald's clerk: and there seems little room for doubting that the money that was the subject matter of the action, found its way into the pocket of Macdonald. It is natural therefore to suppose a strong bias to exist on his part in favour of the defendant, and one that would excite suspicion if his testimony were received. I think the dispensing with the production of the witness at the trial conferred a sufficient advantage upon the defendant, and that he ought not to call upon the plaintiff to pay the expenses. I am therefore of opinion that no order should be made.

Mr. Justice PARK.—I disclaim offering any opinion upon the competency of Macdonald: it is unnecessary. At the first view there would seem to be a discrepancy between the 3rd and 9th sections of the statute: but, on examination, they will be found to be perfectly consistent and distinct; they relate to different subject matters altogether. Before the statute, the party obtaining a mandamus or commission was held not to be entitled to costs. The subject was fully considered in the case of *Fairlie* v. *Parker*, 1 M. & P. 438. There, the plaintiffs had applied for and obtained a mandamus, under the

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statute 13 Geo. 3, c. 63, s. 44, for the examination of witnesses in India, and the writ and depositions were returned to this country; but the defendants did not join in the application for the writ, nor examine or cross-examine witnesses under it; and the plaintiffs obtained a verdict: it was held that they were not entitled to the costs attending the writ or the office copies of the depositions. In delivering my judgment in that case, I referred to *Stephens* v. *Crichton*, 2 East, 259, where, after notice of trial had been given and countermanded, it was *agreed*, that, as several of the witnesses on either side were going abroad, they should be respectively examined upon interrogatories, and that the depositions of either of the parties' witnesses who were then abroad should be taken before commissioners there; and it was held that the party succeeding at the trial was not entitled to the costs of examining his own witnesses upon the interrogatories, or of taking office copies of the depositions of the witnesses of the other party: and Lord Ellenborough observed, "that, however desirable it was that the taxed costs should really indemnify the party who was ultimately proved to be in the right, yet it was necessary to keep a check upon the very great expense to which this might lead, and to

discretion of the court. The statute in question was passed in consequence of the great difficulties and delays that were constantly arising from the want of authority in the courts of common law to examine witnesses out of their jurisdiction; and the legislature have thought fit to leave the costs at the discretion of the court out of which the commission issues. The question therefore is, whether this discretion, under the particular circumstances of this case, would be properly exercised were we to allow the defendant to have his costs. I forbear to enter into any discussion as to the admissibility of the witness. The simple point I take to be this, whether the defendant was not so closely connected with Macdonald, and the advantage derived by him so large, that he ought to pay for the commission himself.

Mr. Justice BOSANQUET.—I agree that it is unnecessary to discuss the question as to the admissibility of the witness or of the examination. The statute gives the court a discretion, and I am of opinion that we shall best exercise that discretion on the present occasion by discharging this rule.

Rule discharged.

ROUX *v.* SALVADOR.

Saturday Jan. 31st.

Hides were shipped on board a vessel at Valparaiso for Bordeaux. The ship sailed from Valparaiso on the 13th May, and on the 7th July put into Rio in consequence of damage by stress of weather. It being found that the hides were so much damaged that it would be impracticable to carry them in specie to the termination of the voyage, they being in such a state that they must either have been annihilated by putrefaction or thrown overboard, they were sold at Rio for one fourth of their value. On the 23rd July, the ship set sail from Rio on her voyage to Bordeaux, and was stranded on the 29th September at the entrance of the Garonne. In an action on a policy containing a memorandum declaring "cocoa and hides free of particular average unless the ship were stranded:"—*Held*—first, that this was not such a stranding of the ship as to entitle the assured to recover for an average loss—secondly, that the loss was a *constructive* only, and not an *actual* total loss—thirdly, that notice of abandonment was necessary to entitle the plaintiffs to recover.

ASSUMPSIT upon a policy of insurance subscribed by the defendant for 200*l.* Plea, the general issue. At the trial before Lord Chief Justice Tindal, at the Sittings in

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London after last Hilary Term, the jury found a verdict for the plaintiff for 27*l.* 15*s.* 6*d.*, subject to the opinion of the court upon the following case:—

"The policy on which the action was brought was effected on goods per the General La Fayette and other ship or ships, at and from (among other ports or places in the Pacific Ocean) Valparaiso, to any port or ports in France and the United Kingdom of Great Britain; with leave to call, touch, and trade at any port or ports, place or places, bays, rivers, and settlements in America or anywhere else; to effect all transhipments; and including the risk of craft to and from the vessel or vessels. The usual perils were insured against; and the policy (which was for 700*l.*) had the following memorandum subscribed—'N. B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five per cent., and all other goods, also the ship and freight, are warranted free of average under three per cent., unless general, or the ship be stranded.' The policy was declared to be on goods, specie, or bullion, as interest might appear: to pay

worthy, and having the hides on board, departed on her voyage from Valparaiso, on the 13th May, 1831, for Bordeaux; and, on the 5th June following, in the course of her voyage, meeting with bad weather, sprung a leak, in consequence of which it was found necessary for the safety of the ship and cargo to put into Rio de Janeiro, being the nearest convenient port, for repair: at which port she arrived on the 7th of July. The whole of the cargo was then landed, and the 1000 hides were sold for the gross sum of 273*l.*, under the circumstances stated in evidence taken at Rio on interrogatories. From that evidence, it appeared that the hides, upon their arrival at Rio, were in a state of incipient putrefaction, occasioned by humidity in the bottom of the vessel. They were all, as it is termed, greased—the hair coming off in the fingers of those who handled them, and, had they been re-shipped, the captain must have thrown them overboard before his arrival in Europe, on account of their extreme putridity. The ship Roxalane being repaired and the leak stopped, she sailed on the 23rd July, 1831, from Rio de Janeiro without the 1000 hides, but with such part of her cargo as had not been sold, on her voyage to Bordeaux: and, in the course of her voyage from Rio de Janeiro to Bordeaux, the ship was stranded at the entrance of the river Garonne, on the 29th September; but the portion of her cargo not sold at Rio was delivered without damage at Bordeaux."

The question to be decided was—"Whether the underwriter was liable for the loss on the hides. If the court should be of that opinion, the verdict was to stand for 27*l.* 15*s.* 6*d.*, being 88*l.* 14*s.* 4*d.* per cent. on the sum of 1117*l.*, the value of the one thousand hides (*a*): if not, a nonsuit was to be entered."

The case was argued in Trinity Term last, when the court took time to consider, and afterwards directed a

(*a*) Being about 13¼ per cent. on the defendant's subscription.

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second argument in this term, upon the question whether under the present circumstances an abandonment was necessary or not.

Mr. *Maule*, for the plaintiff.—The plaintiff is clearly entitled to recover. That he has sustained a loss by a peril insured against, there is no doubt; but the defendant, relying on the memorandum in the policy declaring "cocoa and hides free of particular average, unless the ship were stranded," will contend that this is a case of particular average only. The questions to be considered therefore will be—first, whether there has been such a stranding of the ship as to entitle the assured to claim and recover an average loss—secondly, if no such stranding has taken place, whether the loss can be considered to be a total loss—thirdly, supposing the loss to be total, whether an abandonment was necessary in order to enable the plaintiff to recover.

1. As to the stranding.

1. The memorandum constitutes an exception out of the general liability imposed upon the underwriter by the policy. If the ship be stranded in the course of the voyage, whether the loss or damage be connected with

lets in a general average; and I do not know how to construe the words grammatically, but by saying, that, if the ship be stranded, then it destroys the exception, and lets in the general words of the policy. If a general provision be made in any deed or instrument, and it is there said, that certain things shall be excepted, unless another thing happen which gives effect to the general operation of the deed, if that other thing do happen it destroys the exception altogether. If it had been intended that the underwriters should only be answerable for the damage that arises *in consequence of the stranding*, a small variety of expression would have removed all difficulty; they would have said, 'unless for losses arising *by* stranding.' But, in the body of the policy, they have insured against all losses from the causes there enumerated, which include stranding; and then follows this memorandum, the evident meaning of which is, *free from average*, unless general, or *unless the ship be stranded;* so that, if the ship be stranded, the insurers say they will be answerable for an average loss." [Lord Chief Justice *Tindal.*—As to these goods, the voyage was, by the act of the assured, ended before the stranding took place.]

2. As to whether the loss was total.

2. The loss was total, and therefore the underwriters are liable for general average. By the contract he enters into, the assurer undertakes that the goods or the vessel insured shall not by a peril insured against be prevented from arriving at the port of destination. Wherever, in consequence of the happening of any disaster covered by the policy, it becomes impossible that the adventure can be completed, there the liability of the underwriter attaches. And here the evidence shews beyond all doubt that the hides in question never could have been carried to Bordeaux. In *Manning* v. *Newnham*, Park Ins. 260, Marsh. Ins. 585, 3 Doug. 130, 2 Camp. 624, n., an insurance was effected on ship, cargo, and freight, from Tortola to London: the ship was by stress of weather

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driven back to Tortola, and, being found unfit for the voyage, and it being impossible to repair her, she was sold: there were no vessels at Tortola by which the cargo could be forwarded, and it was accordingly sold for nearly the sum insured: it was held that this was a total loss. In *Wilson* v. *The Royal Exchange Assurance Company*, 2 Camp. 623, it was held, that, where a ship is obliged to put back, and the damage she has sustained is of such a nature that she cannot pursue her voyage, and other ships cannot be procured to take the cargo, it is a total loss of ship, cargo, and freight, however inconsiderable the damage may be, for the voyage in contemplation is lost. So, in *Dyson* v. *Rowcroft*, 3 Bos. & Pul. 474, the policy (on fruit, from Cadiz to London) contained the usual memorandum; in the course of the voyage, the fruit was so much damaged by sea water that it became rotten, and stunk; and, on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo: the ship also, being too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard: it was held that the assured were entitled to recover for a total

undertakes to pay. We ought, indeed, to look at the case with some suspicion, where there is so much temptation to throw the cargo overboard, But here it is found that the necessity of so doing arose from sea-water shipped during the course of the voyage; and that the commodity was in such a state that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated by being thrown overboard. Had it not been so annihilated, it would have been annihilated by putrefaction: and is it not as much lost to the assured by being thrown overboard, as if the captain had waited until it had arrived at complete putrefaction? The case of *Cocking* v. *Fraser*, Park Ins. 181, was the only thing that raised any doubt in my mind, and it is certainly a very strong case. But the authority of that case is much shaken by the observation of Lord Kenyon upon it, in *Burnett* v. *Kensington*. I suspect that the words 'of no value,' applied to the cargo in the case of *Cocking* v. *Fraser*, are somewhat too large, and that the fact was, not that the cargo was in such a situation as to make it impossible to preserve it, but that it was so much damaged as to be no longer valuable to the owners, because it was not worth carrying to the port of destination. Lord Kenyon, speaking of *Cocking* v. *Fraser*, says that he cannot subscribe to the opinion there given, that, 'if the commodity specifically remain, the underwriter is discharged.' I think myself, therefore, at liberty to consider the case of *Cocking* v. *Fraser* as something less strong than it appears to be." The authority of this case of *Dyson* v. *Rowcroft* has never been questioned. In the case of a ship necessarily broken up and sold, its character of a ship being destroyed, the loss is not the less total because something is obtained for the timbers. [Mr. Justice *Bosanquet*.—Whether do you contend that this was an *actual* or a *constructive* total loss?] An *actual*

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total loss. Wherever it becomes impossible to carry on the adventure, the loss is total: it is the adventure that is the subject matter of the insurance, not the goods. Undoubtedly, a mere retardation of the voyage, where the goods are not of a perishable nature, and are still capable of being transmitted to their destination, though in a deteriorated condition, will not constitute a total loss—*Anderson* v. *Wallis*, 2 M. & S. 240—*Hunt* v. *The Royal Exchange Assurance Company*, 5 M. & S. 47—*Glennie* v. *The London Assurance Company*, 2 M. & S. 371 (*a*).

3. As to the necessity for a notice of abandonment.

3. Abandonment is only necessary for the purpose of converting a *constructive* into an *actual* total loss—*Mellish* v. *Andrews*, 15 East, 13. Where the goods are altogether put out of the possession of the assured, and the adventure totally destroyed and at an end, abandonment is not necessary; and an actual total loss may be said to have been suffered in every case where it becomes impossible to prosecute the voyage or the adventure. From the evidence in the present case, it appears that the hides, on the arrival of the vessel at Rio, were in a state of incipient putrefaction, and that, had they been reshipped there, they must have been thrown overboard

There was in fact nothing to abandon: mere salvage is not a subject that requires abandonment; until abandonment, or action brought, the salvage is the property of the assured. Lord Mansfield, in *Baillie* v. *Moudigliani*, Park Ins. 90, says—" In the case of a loss total in its nature, with salvage, the owner of the goods may either take the part saved, or abandon." In *Mullett* v. *Sheddon*, 13 East, 304, an American, properly licensed to export saltpetre from Calcutta to America, having insured it for the voyage, the ship was seized by the captain of a British ship of war at the Cape of Good Hope, and the cargo condemned, unshipped, and sold by order of the court of Admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captors' costs: it was held that the assured might recover as for a total loss, without notice of abandonment, the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the Cape, under the order of the court there. In *Doyle* v. *Dallas*, 1 M. & Rob. 48, where a ship, being wrecked, was sold by the owner and master, and soon after got off by the purchaser, and repaired, though at a great expense, it was ruled by Lord Tenterden that the underwriters would be liable as for a total loss, provided the jury should think that the assured had exercised a sound judgment, and the sale was for the benefit of all parties: and in that case there was no abandonment. In *Hodgson* v. *Blakiston*, Park Ins. 281, n., *Martin* v. *Crokatt*, 14 East, 465, and *Bell* v. *Nixon*, Holt, 423, the subject matter of the insurance was still in existence, and therefore abandonment was held necessary: and in *Allwood* v. *Henckell*, Park Ins. 280, which will probably be relied on by the other side for the opinion expressed by Lord Kenyon, the assured was not interested in contesting the point. But the case of *Cambridge* v. *Anderton*, 2 B. & C. 691, 4 D. & R. 203,

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R. & M. 60, 1 C. & P. 213, is precisely in point. There, the ship was so much damaged by perils of the sea, that, in order to render her sea-worthy, it would cost more to repair her than she would be afterwards worth, and the captain sold her to a purchaser who partially repaired her and sent her upon a voyage which she never completed, in consequence of her infirmity; and it was held that the assured were entitled to recover as for a total loss, without giving notice of abandonment.

1. As to the stranding.

Mr. Serjeant *Coleridge*, for the defendant.—1. Undoubtedly, the memorandum in question constitutes, not a mere exception, but a condition that on the happening of a given event the assurers' liability shall attach (*a*). It must, however, be construed with reference to the voyage and the presumed intention of the parties. The meaning of it is, that all damage happening to goods *on board* at the time shall be attributed to the stranding. This is all that *Burnett* v. *Kensington* decides: and it is so laid down by Lord Kenyon in *Nesbitt* v. *Lushington*, 4 T. R. 783. "On the meaning of the memorandum," says his Lordship, "I have no doubt. The articles there enumerated are of a perishable nature: as it might be difficult to ascer-

ship is stranded, then the underwriters agree to ascribe e loss to the stranding, as being the most probable oc- sion of the damage, though that fact cannot always be certained." Suppose the stranding to have taken place fore the goods were put on board, could it be contended r a moment that any damage they might afterwards stain in the course of the voyage would constitute a loss ithin the condition? Upon the same principle, it may be ked, why is a stranding after the termination of the ad- enture (as here) to impose a liability upon the assurers? r, suppose this vessel to have had nothing on board but e hides, and for some reason they were taken out and ld in the course of the voyage, and the vessel proceeded ballast, and a stranding took place before she reached ordeaux—could that subsequent stranding have any ef- ct with reference to the hides? Upon the authorities, well as upon principle, it is perfectly clear that the ndition in question is only applicable to and coextensive ith the continuance of the goods on board.

2. Then, do the facts of this case entitle the plaintiff contend that this was within the meaning of the policy *total* loss? The hides had no doubt sustained con- derable damage. On the ship's arrival at Rio, they ill existed as hides, though in a deteriorated condi- on; and probably, unless tanned, they never could have ached Bordeaux. But, in order to constitute an actual tal loss, there must be an absolute physical destruction the article. In *Cocking* v. *Fraser*, Lord Mansfield ys: "The insurer undertakes for all losses, except par- ular damage, unless the ship be stranded: he engages ainst a total loss. What is a total loss? The total loss the thing insured is the *absolute destruction* of it by the reck of the ship. The fish may all come to port; though, om the nature of the commodity, it may be damaged, it ay be stinking: still, as the commodity *specifically* re- ains, the underwriter is discharged." That case has

2. As to whether the loss was total.

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never been expressly overruled: and it is supported by *Mason* v. *Skurray*, Park Ins. 191. That was an action for a total loss on peas. The peas arrived at the place of destination; but, being much damaged, the produce of them was less by about three fourths than the freight. The defence set up by the underwriters was, that, if the goods mentioned in the memorandum arrive at the market, though a loss amounting to a total loss has happened, the underwriters are not liable. Several witnesses conversant in settling losses upon policies, proved that the usage in such cases was, to hold the underwriters discharged. Lord Mansfield, in addressing the jury, said: "The question turns upon the general import of the exception: the witnesses examined have put it on that point; and they hold, that, if the specific thing come to the port of delivery, the underwriter cannot be called on. How did this matter stand before the year 1749? When the policy was general, and operated as an indemnity, there was little difference between a total and a partial loss. But the cases now stand upon the memorandum, which is in very general words. The question is, whether the usage has not explained the generality of the words. If it has, every man who contracts for a policy under usage does

venture. So, in *Dyson* v. *Rowcroft*, there was an actual nihilation of the cargo, by being thrown overboard. In ssy v. *Milford*, 15 East, 559, which was an action upon policy of insurance on flax, valued at so much, and warnted free of particular average, it was held, that, if the essel be wrecked, and the assured do not abandon, but bours to save the cargo, and in fact saves a part (one kteenth of the whole), though much damaged, he is entled to recover as for a total loss of that part which was n fact totally lost, but not for the rest which was saved o him in specie, though deteriorated. In *Thompson* v. *The Royal Exchange Assurance Company*, 16 East, 214 which occurred some years after the decision of *Dyson* v. *Rowcroft*), it was held, that, where underwriters on goods xempt themselves from particular average, where the hip was wrecked, and the goods were brought on shore o damaged as to become unprofitable, an abandonment ould not turn this into a total loss, *as the goods existed.* ord Ellenborough there says: "All the goods were got n shore and saved, though in a damaged state. If this an be converted into a total loss by a notice of abandonent, the clause excepting underwriters from particular verage, may as well be struck out of the policy. We can nly look to the time when the loss happened, and the oods were landed; and then it was not a total loss, however nprofitable they might afterwards be." In *Hedberg* v. *Pearson*, 2 Marsh. 432, 7 Taunt. 154, Holt, 349, where a hip was stranded, and the cargo, consisting of hogsheads f sugar, was all got on shore, each hogshead containg some sugar, though but little, and nearly all damaged; was held that the jury were warranted in finding this to ave been an average loss only. And in *M'Andrews* v.

nees at Liverpool, and sold, and oduced little more than freight d salvage; but the rice did not oduce sufficient to pay the freight. The court were of opinion that this was a case of *particular* average only, and therefore the underwriter was exempted by the warranty.

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Vaughan, Park Ins. 185, in an insurance on fruit
bon to London, it appeared that the ship was
and recaptured, brought into Portsmouth, and a
arrived in London: but the cargo, by the captu
ture, and consequent length of the voyage, had
a damage of 80*l.* per cent. The assured, howe
heard of the capture till the ship was safe at Po
and then he offered to abandon. Lord Ken
"As there has been no stranding, there canno
covery for a partial loss. The question then is
the assured can recover for a total loss. Had
tiff heard of the capture only, he might have ab
but he hears nothing of the accident till the
safety. The cargo arrives at the port of destinat
though it is good for very little, yet it has invari
held that the voyage must either be lost, or the c
be one of those mentioned in the memorandum
wholly and actually destroyed, to entitle the a
recover." The plaintiff was nonsuited (*a*).

3. As to the necessity for a notice of abandonment.

3. Abandonment was at all events necessary,
being at most a *constructive* total loss; in which
admitted on the part of the plaintiff there ma

[redacted]

perty that may chance to be recovered from shipwreck, apture, or any other peril stated in the policy. It has so been observed, and from the preceding sentence it is vious, that, when we speak of a total loss, with respect insurances, we do not always mean that the thing insured is absolutely lost and destroyed: but that, by some the usual perils, it is become of so little value as to enable the insured to call upon the underwriter to accept of hat is saved, and to pay the full amount of his insurance, if a total loss had actually happened. Indeed, the ord abandonment conveys the idea that the whole property is not lost; for, it it is impossible to cede or abandon that which does not exist." But it is said this is an termediate case between an actual and a constructive tal loss, viz. a total loss with benefit of salvage to the assurers, and therefore no abandonment is necessary. One ound upon which abandonment has been required is, at the parties may know their respective rights, and ave the means of availing themselves of those rights at he earliest possible period; and therefore it has been held hat notice of abandonment cannot be given at all unless given within a reasonable time—*Allwood* v. *Henckell* (per Lord Kenyon) Park Ins. 280, *Abel* v. *Potts*, 3 Esp. 242, *Aldridge* v. *Bell*, 1 Stark. 498, *Mitchell* v. *Edie*, 1 T. R. 608, *Hunt* v. *The Royal Exchange Assurance Company*, 1 M. & S. 47, *Anderson* v. *The Royal Exchange Assurance Company*, 7 East, 38, 3 Smith, 48, *Barker* v. *Blakes*, East, 283, *Kelly* v. *Walton*, 2 Camp. 155. The right of he assured to abandon, and the necessity for a notice of bandonment to the assurers, are co-extensive: if it be inended to treat the loss as a total loss, the assured must bandon. In *Hodgson* v. *Blakiston*, Park Ins. 281, it was eld that a notice of abandonment is necessary, though he ship and cargo have been sold and converted into oney when the notice of the loss was received. In *Manning* v. *Newnham*, according to the report in Douglas,

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there was an abandonment. In *Read* v. *Bonham*, 6 Moore, 397, 3 B. & B. 147, there was likewise an abandonment. In *Mullet* v. *Sheddon*, there was an actual total loss by one of the perils insured against: the property was divested by the seizure and sale. In *Martin* v. *Crokatt*, 14 East, 465, where the ship was obliged to put into a place of safety in the course of her voyage, in consequence of damage sustained by a peril of the sea, and the assured did not abandon, but merely applied to the underwriters for directions how to proceed upon an estimate of the expenses of repair, and they declined to interfere; it was held that he could not afterwards convert this into a total loss on account of the expenses of the salvage being found in the result to have exceeded the value of the ship, which was ultimately sold in the place into which she had been driven; though the sale was directed by the assured to be made for the benefit of all concerned. In *Bell* v. *Nixon*, Holt, 423, a vessel was driven into a port where there was no dock to receive her, and it appeared, upon examination and survey, that she had suffered so much by sea perils that it was judged expedient to break her up and sell her for old timber: it was held that the assured was

Bayley (whose ruling was afterwards confirmed by the court), that, where, by means within the reach of the master, the ship can be so treated as to retain the character of a ship, he cannot, by selling her even bonâ fide, convert the average into a total loss, but the underwriters are entitled to have those means used on their account (*a*). The learned judge there said: "I know of no such head of insurance law as loss by sale. If the situation of the ship be such that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it with a fair hope of restoring it to the character of a ship, he cannot by selling it turn it into a total loss." Then, what are the facts of the present case? On the 7th July the hides arrived in specie at Rio, but, in such a state that they were not capable of being carried further on the voyage. They were all, however, in a condition to be turned to that sort of use to which they had originally been destined, though not at the destined place: they were necessarily sold at Rio, instead of being carried to Bordeaux. The money produced by the sale was received by the assured: it was at all events necessary to abandon that before he claimed as for a total loss. If the bringing of the action gives the defendant the right to the proceeds, suppose the action to be not maintainable, will the right to the money revert to the assured? How, then, can the bringing the action be held to supply the want of an abandonment? Or, suppose the proceeds of the sale to be in the hands of a third person, not an agent of the assurer, could the latter in his own name sue that person, when there had been no abandonment, or would he be entitled to use the name of the assured for that purpose? It will be manifestly for the convenience of the commercial world that the old rule should prevail, viz. that abandonment be held necessary

(*a*) And see Somes *v.* Sugrue, 4 C. & P. 276.

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in all cases where there is anything to abandon, whether the goods exist in specie or have been sold.

Mr. *Maule*, in reply.—Wherever the ship is stranded, whether the goods are on board or not at the time, the general words of the policy take effect.—To constitute a total loss, it is said there must be a physical destruction of the goods, or a non-arrival of the ship. But that is not so. Suppose the goods to be seized by pirates, there is no physical destruction of them, nor of necessity a non-arrival of the ship. In *Allan* v. *Sugrue*, 3 M. & R. 9, 8 B. & C. 561, a ship insured in a valued policy for 2000*l.* was damaged by the perils of the sea; she might have been repaired for 1400*l.*, but she was not worth repairing: it was held that this was a total loss.—With respect to abandonment—the argument as to the superior convenience of the rule suggested, would have been quite as applicable in *Mullet* v. *Sheddon* as in the present case. The underwriter, paying the entire loss, has all the rights and remedies that the assured would have. [Lord Chief Justice *Tindal*.—He could not, of his own authority, without abandonment, bring an action in the name of the assured.] All the cases

Upon the argument before us the plaintiff has contended that he is entitled to recover, either for *an average loss* on the hides, upon the ground that there has been a stranding of the ship within the meaning of the policy, so that the warranty as to hides being free from particular average, may be considered as altogether struck out of the policy; or for *a total loss* with benefit of salvage to the underwriters, on the ground that the loss is in its nature total. The defendant, on the other hand, contends that the loss proved at the trial is an average loss only, and that the stranding of the ship under the circumstances and at the time stated in the case cannot have the effect of opening the warranty: and the defendant further contends, that, even if the loss is to be considered as a total loss, the plaintiff cannot recover it, for want of an abandonment. The three questions, therefore, that have been discussed upon argument before us are these—first, whether there has been such a stranding of the ship as to entitle the assured to claim and recover an average loss—secondly, if no such stranding has taken place, then whether the loss can be considered to be a total loss—thirdly, admitting the loss to be total, whether an abandonment was necessary in order to enable the plaintiff to recover. Upon there three points we proceed to give the opinion at which we have arrived.

1. As to the stranding.

1. The facts which relate to the stranding of the ship are shortly these. The hides in question were shipped on board the Roxalane, at Valparaiso, for Bordeaux, in France. The ship sailed from Valparaiso on the voyage insured on the 13th May, 1831, and was taken into Rio de Janeiro in consequence of stress of weather, on the 7th July. The hides insured were sold at Rio, such sale being necessary and for the benefit of all concerned. After the sale the ship, being repaired, departed on the 3rd October on her voyage to Bordeaux, not having any part of the

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hides insured on board, and was stranded at the entrance of the Garonne on the 29th December. The stranding of the ship therefore took place during the voyage which was described in the policy, but not until after the hides had been landed, and after the whole of the assured's adventure and the whole of the risque of the underwriter upon the hides, that is, in effect, after the whole of the voyage insured, had been determined and ended by the act of the assured. And, under these circumstances, we think there is neither principle nor authority upon which it can be held that the subsequent stranding of the ship satisfies the condition upon which the warranty in the policy depends. The general principle laid down in *Burnett* v. *Kensington*, that, if the ship be stranded, the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed: the policy, after the stranding, must be construed as if no such warranty had been written on the face of it. But the question is, within what limits of time a stranding must take place in order to produce such effect. Now, every other clause in the policy relates to the voyage insured, and to that alone: the liability of the underwriter on goods com-

ture commences, and, after the loading, the ship should sail, and an average loss be sustained; it would surely be unreasonable to contend that the exception or condition of the warranty should have an operation before the policy (that is, the warranty itself) has attached. And a much greater difficulty opposes itself to the position that the stranding after the policy is at an end shall have any operation on the clause of warranty. Indeed, there is no more reason why a stranding which takes place in a part of the voyage described in the policy, but at a time subsequent to the termination of the risk on the policy, than upon a subsequent voyage altogether distinct from that mentioned in the policy. Again, the rights of the parties, the assured and the underwriter, were fixed and determined at the time of the sale at Rio. The loss was then either a total loss with benefit of salvage, or an average loss. There is an end of any contingency, because the voyage which is the subject of the risk is over. We think, therefore, it would be a forced construction of the policy, not consistent with the ordinary rules of interpretation, and certainly not sanctioned by any decided case, to hold that the stranding in the Garonne in the month of December can affect the nature of the loss upon hides which were unshipped and sold in the course of the voyage in the July preceding.

2. As to whether the loss was total.

2. As to the second question, whether the loss upon the hides is a total loss—we are all of opinion, that, upon the evidence stated in the case, the loss is a constructive total loss: for, we take the necessary inference to be drawn from that evidence to be, that, in consequence of damage from the perils of the sea, one of the perils insured against, it became impracticable to carry the hides in specie to the termination of the voyage for which they were insured; and that, if it had been possible to take them to Bordeaux, they would have arrived in a state of putridity, having altogether lost the character of hides. We do not hold the loss to be total upon the ground that

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the hides, if carried to Bordeaux, would have arrived in so bad a state that they would have sold for less than the freight and expenses, or would have been altogether unsaleable there: that state of circumstances might not be sufficient to make a constructive total loss where the underwriter has guarded himself from being answerable for average losses by a special clause in the policy. But we held it to be total on the ground (and upon that ground only) that, upon the evidence, the hides never could have arrived as hides at all. The present case appears to agree so nearly with that of *Dyson* v. *Rowcroft*, 3 B. & P. 474, that no sound distinction in this respect can be made between them. And the judgment given by Lord Alvanley appears to us to govern the case now under discussion. "Unless," says Lord Alvanley, "the consequence of the damage sustained be the total loss of the commodity, the underwriter does not agree to be answerable; but, if the commodity be totally lost to the assured, he undertakes to pay." And afterwards, discussing what is a total loss, he says: "The commodity here was in such a state that it could not be suffered to remain on board consistently with the health of the crew. In con-

Recognition of Dyson v. Rowcroft.

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very nature of the contract of insurance, which is a contract of indemnity only: for, the assured would obviously be more than indemnified, unless the underwriter is put into his place as to all the benefit that may be derived from what has been actually saved or recovered from the loss. Hence, it has prevailed as a general rule in the law of insurance, and that from so early a time that it is difficult to find a case in the books in which it is not taken as an admitted principle, that, in order to recover for a constructive total loss, the assured must first abandon. It is unnecessary, however, to refer to cases or authorities in support of this general principle, as it is admitted by the counsel for the plaintiff that abandonment is necessary in all cases of a constructive total loss, where any part of the thing insured subsists or remains in specie; and it is only denied that it extends to a case like the present, where what was saved has been actually sold, and the money paid over to the agent of the assured before any notice of the loss. In such a case, where the adventure is at an end, and nothing remains to be performed by the underwriter with respect to the part saved, it is argued that an abandonment is altogether useless, and consequently must be considered in law as unnecessary; and it is contended that there is neither decided authority nor reason in support of a contrary position. It will be convenient, therefore, to consider, first, what is the state of the authorities in the books on this precise point; and, if the authorities shew that an abandonment is necessary, we will next consider whether there is any reason or principle for holding the present case not to fall within the general rule.

That the assured must abandon before he brings his action, where the ship has been captured and re-captured, and sold under the order of a Vice Admiralty Court, and where, after payment of the salvage to the re-captors, the remainder of the price has been paid into court for the benefit of those who may claim as owners, appears clearly

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from the earliest case to be found in our books upon the subject of abandonment, viz. that of *Pringle* v. *Hartley*, 3 Atk. 195. In that case, after the plaintiff had sued at law for a total loss, and, after proving an offer to relinquish his interest to the insurers, recovered a verdict, Lord Hardwicke, on a bill filed for an injunction, held there was no ground for it, but that the plaintiff, being willing to relinquish his interest in the salvage to the underwriter, ought to have recovered the whole money insured. Now, it must be admitted that this decision does not go the length of governing the present case; for, in the case referred to, as Lord Hardwicke observes, "it is uncertain whether the insured will receive any thing or not; and, if any thing be recovered, he must have an allowance for his expenses in recovering it:" and there are even expressions used by Lord Hardwicke in giving his judgment, which would rather lead to the inference, that, if the money had been paid out of court to the owner before the action was brought, the jury might, in his opinion, have taken notice of it, and it might have been deducted out of the money recovered on the policy. So that the case of *Pringle* v. *Hartley* certainly cannot be advanced as an express authority that an abandonment

of that of *Pringle* v. *Hartley*. The ship had been sold under the order of the Vice Admiralty Court of Antigua by a prize-agent, who received the proceeds, and was to pay them over to those concerned, upon payment of one eighth salvage to the captors. The question was whether the abandonment was made in time; and it was thereupon contended by the plaintiff, that, admitting there was no abandonment, yet, as the property had been absolutely sold and converted into money before the parties knew where the ship was taken to, the loss was absolutely total in its nature, and therefore there was no occasion for an abandonment. Lord Kenyon, though he did not give any decided opinion on the point, said he inclined to think "that an abandonment was necessary, and that the case was the same as if the property had remained in specie at Antigua, and had not been sold:" and, as the plaintiff recovered upon the footing of *an average loss* only, it would seem that Lord Kenyon's opinion was acquiesced in. The next case in the order of time is that of *Hodgson* v. *Blakiston*, Park Ins. 281, n., before the same noble and learned Judge; and this, like the last, though a Nisi Prius decision only, is a case directly in point, that a notice of abandonment is necessary, though the ship and cargo have been sold and converted into money at the time when the notice of the loss is received. The opinion of Lord Kenyon in this case must have been assented to as law at the time, as no motion appears to have been made to set the verdict aside. And indeed the case itself is cited and relied upon as authority by the court of Common Pleas in their judgment upon the case of *Read* v. *Bonham*, 6 Moore, 397, 3 B. & B. 147. That case, again, is a distinct and direct authority upon the present point. There, the ship had been sold and the money paid to the captain, and, after a verdict for the plaintiff for a total loss, a new trial was moved for on the grounds that the sale of the ship had not been necessary, and that

Remarks on Hodgson v. Blakiston.

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the abandonment had not been made in time: the court, however, refused to grant a new trial on either point, though Mr. Justice Richardson wished both to be reconsidered by the jury. But it is evident from the report that it was assumed as an undoubted principle by the whole court that abandonment was necessary in that case; the dissent of Mr. Justice Richardson as to the *time* of the abandonment making the inference still more strong, that, in the judgment of the whole court, an abandonment was necessary. And this statement of the case of *Read* v. *Bonham* removes in some degree the weight of the judgment of Mr. Justice Bayley in the case of *Cambridge* v. *Anderton*, as reported in 1 C. & P. 215, n., in which Mr. Justice Bayley is made to say: "I take the legal principle to be, that, if, by any perils within the policy, the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment." For, Mr. Justice Bayley proceeds to cite the case of *Read* v. *Bonham* as an authority in support of his opinion; which case, although certainly an authority for the position that a sale of the ship in case of urgent necessity is justifiable and constitutes a total loss, is no authority for the position that abandonment is unnecessary

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The necessity of abandonment, therefore, in the present case, so far as it stands upon authority, rests on the generality of expression used in all the early cases, that, wherever the assured claims for a total loss, there being any thing saved, he must first relinquish to the underwriter all his interest in what remains, and upon the express authority of the cases referred to; in opposition to which there is found no other decided case than that of *Cambridge* v. *Anderton;* so that the balance of authority is clearly in favour of the position that abandonment is necessary in the present case. And, upon principle, if the matter were res integra, we should come to the same conclusion; for, as the assured in no case is bound to consider the loss a total loss, but may always take to what is saved, and recover for an average loss, if it is to be held that abandonment is unnecessary where there has been a sale, the underwriter can have no certainty as to his right or his liabilities before the assured determines his election by bringing the action for a total loss. This uncertainty, in itself, and if no other consequence follows, is highly prejudicial to the underwriter. It may be further prejudicial in its direct consequences; agents in whose hands the proceeds are left may fail; the rate of exchange may alter where delay in procuring the remittance of the price has taken place; and, still further, the right of the underwriter to dispute the validity of the sale with the purchaser of the ship or cargo, upon the ground of fraud, might by the intervention of time be impaired or entirely defeated. As notice of abandonment, therefore, under the circumstances of this case, is an act of no difficulty to he assured, of great service to the underwriter, as it is vell calculated to prevent fraud, as it is consistent with he general understanding that has prevailed in practice, nd is sanctioned by the authority of decided cases; we hink it was a necessary preliminary to the plaintiff's right o sue for a total loss in the present case, and therefore,

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for want of such notice of abandonment, we give our judgment for the defendant.

Judgment for the defendant.

Saturday, Jan. 31st.

The 93rd rule of Hilary Term, 2 Will. 4, does not prohibit the setting off of mutual claims for costs between the parties in the same suit.

In an action against three defendants, a verdict was found against one and in favour of the other two:—Held, that the costs of the successful defendants might be deducted from the amount of

GEORGE *v.* ELSTON, EVELEIGH, and CROOK.

THIS was an action of trespass. The three defendants appeared by the same attorney, and pleaded jointly. A verdict having been found for the plaintiff against the defendant Crook, damages and costs 45*l.* 10*s.*, and for the other defendants—

Mr. Serjeant *Wilde*, on a former day, on the part of the defendants Elston and Eveleigh, upon an affidavit suggesting the plaintiff's incapacity to pay their costs (37*l.* 10*s.*), obtained a rule nisi that those costs might be deducted from the damages and costs due to the plaintiff from the other defendant (*a*).

Mr. *Kelly* shewed cause.—Formerly there was a difference between the practice of the courts of King's Bench

ndants, got a verdict against one, and the other three e acquitted. On an affidavit that the plaintiff was an rant jew, and poor, the defendants who were acquitted ined a rule to shew cause why their costs should not deducted out of what the prothonotary should allow plaintiff for costs against the defendant who was d guilty: but, on cause being shewn, the court de- d the motion to be unprecedented, and discharged rule. That which this motion seeks is precisely what 93rd rule of Hilary Term, 2 Will. 4, intended to rd against, viz. the prejudice of the attorney. It pro- s that "no set-off of damages or costs between parties l be allowed to the prejudice of the attorney's lien in particular suit against which the set-off is sought."

Ir. Serjeant *Wilde*, in support of his rule.—*Mordecai utting* is answered by *Roberts* v. *Biggs*, Barnes, 146. l, in the subsequent case of *Schoole* v. *Noble*, 1 H. Bl. where there were several defendants, and some went rial and obtained a verdict, and others suffered judg- t by default, this court allowed the damages and costs he judgment by default to be set off against the costs d on the postea to those defendants who had a ver- . *Nunez* v. *Modigliani* and *Bourne* v. *Bennett* are also oint to shew, that, before the rule of court referred to, right to set off under circumstances such as the pre- was undoubted. And the proviso in that rule, "that rlocutory costs *in the same suit*, awarded to the adverse y, may be set off," clearly shews that the rule was only nded to restrain and prohibit the setting off of costs in s actions between the same parties, so far as is neces- for the protection of the attorney.

ord Chief Justice TINDAL.—The 93d rule only ap- s to the set-off of damages or costs between the same ies in different suits: here, the set-off sought is of

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costs incurred in *the same suit*. The case therefore rests upon the principle that obtained before the making of the rule. *Schoole* v. *Noble* seems to me to decide the question. A pauper plaintiff is not to be permitted improperly to bring defendants before the court, and then turn round and say that the costs of those as against whom he is unsuccessful shall not be set off against his claim upon others of the defendants against whom he has obtained a verdict.

Mr. Justice VAUGHAN.—The only difference between *Schoole* v. *Noble* and this case is, that there the judgment against the unsuccessful defendants was a judgment by default, and here by verdict.

Rule absolute (*b*).

(*b*) The defendants Elston and Eveleigh sought by the rule also to set off a sum of 13*l*. 3*s*., due to them from the plaintiff for costs of a former action of trespass against them, in which the plaintiff was nonprossed. But the court held that the set-off must be confined to the costs of the particular suit.

Under the 74th rule of Hilary Term, 2 Will. 4, which provides that "the costs of all issues found for the defendant shall be deducted from the plaintiff's costs," the deduction is in like manner made without regard to the attorney's lien.

Mr. *Bere*, on a former day, obtained a rule calling on the plaintiff to shew cause why this declaration should not be set aside for irregularity, on the ground that the process was returnable more than a year before the delivery of the declaration.—He cited *Worley* v. *Lee*, 2 T. R. 112, *Cooper* v. *Nias*, 3 B. & A. 271, 1 Chit. R. 669, *Morton* v. *Grey*, 9 B. & C. 544, and the 35th rule of Hilary Term, 2 Will. 4, by which it is provided that "a plaintiff shall be deemed out of court, unless he declare within one year after the process is returnable."

Mr. Serjeant *Coleridge* shewed cause.—The practice founded upon the opinion expressed by Mr. Justice Buller in *Worley* v. *Lee*, and the rule of court of Hilary Term, 2 Will. 4, are only applicable to personal and not to real actions. At all events, the objection does not apply to the defendant Jackson, as to whom the declaration is clearly within time: and the plaintiff is not bound to proceed against all parties. In *Christie* v. *Walker*, 1 Bing. 48, 7 Mo. 201, the plaintiff sued out bailable process against A., on which he was arrested and put in bail, and a week afterwards the plaintiff sued out serviceable process against B., C., D., and E., and delivered a declaration to A. as against him and the four other defendants jointly, as of the term after the writs were returnable: it was held that such declaration was regular, the object of the process being merely to bring the defendants into court, and the plaintiff not being bound to declare until after appearance by all.

Mr. Serjeant *Wilde*, Mr. Serjeant *Bompas*, and Mr. *Bere*, in support of the rule.—Quare impedit is not a real action. Though usually classed amongst real actions, it is in fact a mixed action; the plaintiff therein seeks to recover a chattel interest and also damages.—Com. Dig. "*Action*," Vin. Abr. "*Presentation*," (M. c.), *Eaton* v. *Southby*,

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Willes, 131, *Rennell* v. *The Bishop of Lincoln*, 11 Moore, 139, 3 Bing. 223, *Mirehouse* v. *Rennell*, 1 M. & Sc. 683, 8 Bing. 490 (*a*). As to the time of declaring, the rule is thus stated in Tidd's Practice, 9th edit. 421: "Mr. Justice Buller having expressed an opinion (in *Worley* v. *Lee*), that, by the general rules of law, a plaintiff must declare against a defendant within *twelve months* after the return of the writ, though, by the rules of the court, if he do not deliver his declaration within *two terms*, the defendant may sign a judgment of non-pros; it is now settled, agreeably to that opinion, that, unless the defendant take advantage of the plaintiff's neglect by signing a judgment of non-pros, the plaintiff may deliver his declaration at any time within *a year* next after the return of the writ." Originally, the mode of commencing the action, declaring, and casting essoins, was the same in all actions (*b*): and the observations of Mr. Justice Buller are general, and not limited to personal actions. At the time these rules first obtained, the pleadings were ore tenus: it necessarily follows therefore that the plaintiff or demandant could only count when the defendant or tenant was in court: and in no case has it been held that the plaintiff might keep the cause in court longer than twelve months. But a plaintiff

be given in the year at least, and more if conveniently it be, so that they shall have five or six days at the least e year. In assizes of darrein presentment, and in a of quare impedit, of churches vacant, days shall be ı from fifteen to fifteen, or from three weeks to three s, as the place shall hap to be near or far. And in a of quare impedit, if the disturber come not at first day that he is summoned, nor cast no essoin, he shall be attached at another day; at which day come not, nor cast no essoin, he shall be distrained ıe great distress above given; and if he come not , by his default a writ shall go to the bishop of same place, that the claim of the disturber for that shall not be prejudicial to the plaintiff; saving to the rber of his right at another time, when he will sue fore." Sir Edward Coke, in commenting upon this te, 2 Inst. 124, 125, says: " By assent of parties a r day may be given than is prescribed by this act, hat assent must be entered of record. And it is to be ved, that, by the common law, great delays be disal- l in four kinds of actions, viz. in all writs of dower, *impedit*, assize of darrein presentment, and assize of disseisin, and therefore no protection shall be allowed, soine de servitio regis shall be cast in any of them. ıe common law, in a quare impedit, the process was, ıons, attachment, and distresse infinite, which was mis- ous in respect of the laps: now it is provided, that, appear not at the grand distresse, judgment shall ven for the plaintiff, and a writ to the bishop awarded. are impedit is brought against two; upon the distress, loth appear, and the other makes default; in 7 E. 3, resolved that the plaintiff should not presently have t to the bishop against him that makes default, for it might be that the other that appears shall have st the plaintiff a writ to the bishop: and it was there that it was not reasonable that upon one original the

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plaintiff should have one writ to the bishop for him, and another against him; and it is not against reason, if the other defendant can bar the plaintiff, for him to have a writ to the bishop against the plaintiff by the common law; and so be the later books, and common experience at this day. If the defendant appear at the grand distresse, and take a day by prece partium, and after make default, no writ shall be awarded to the bishop, for this case in respect of his appearance is out of the statute; but a new distresse shall be awarded." But, if the plaintiff failed to appear on the day, he was clearly out of court. Coke further states, that, in quare impedit, some essoins were excluded for fear of lapse, which takes place if the church be vacant six months: how, then, can it be contended that the time of declaring is unlimited? [Lord Chief Justice *Tindal*.—The parties here were not all in court until the 15th April, 1834.] The plaintiff ought in that case to have obtained a rule for time to declare. All that the present rule seeks, is, that the joint declaration against the three defendants may be set aside, the cause as to two of them being by the plaintiff's own default out of court: the plaintiff may perhaps still declare against Jackson, provided the law allows him

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to the third defendant, Jackson, the incumbent, an alias quare impedit was issued, returnable on the 15th April, on which alias writ he was summoned and appeared. The declaration in quare impedit was not delivered until the 10th January, 1835. One ground upon which the motion was urged, was, the new rule of court of Hilary Term, 2 Will. 4, no. 35: but we think those rules do not extend to real actions, but to such proceedings only in which the three courts of Westminster exercise a concurrent jurisdiction. The ground, however, principally relied on, is, the general rule of law by which a plaintiff must declare within twelve months after the return of the writ. This is laid down by Mr. Justice Buller in *Worley* v. *Lee*, as an acknowledged rule of practice—not that the defendant can sign any judgment of non-pros for not declaring, for no such judgment can be signed until after a demand of declaration—but that, after the lapse of a twelve-month from the return of the writ, the delivery of the declaration comes too late. The same rule is admitted in *Penny* v. *Harvey* and in *Morton* v. *Grey*. In *Cooper* v. *Nias*, the question arose whether the twelve-month was to be computed from the return day of the writ or the time of the appearance. The court said—"The rule is, if the plaintiff does not declare within a year after the return day of the writ, he is out of court. The safest course is, to reckon the twelve months from the return day: the time given to put in and perfect bail is merely matter of indulgence." No case appears by which this rule has been shown to be applied to real actions; but, at the same time, no distinction is made in the books between real and personal actions, and the rule in principle applies equally to actions of all kinds—the object being, that suits shall not be kept alive an unreasonable time after the parties are in court; and, if the demandant is not bound to declare within one year, there seems no reason why he should not be at liberty to do so for an indefinite period. The plaintiff or

The rules of Hilary Term, 2 Will. 4, do not extend to real or mixed actions; but only to personal actions in which the three courts exercise a concurrent jurisdiction.

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demandant is not injured by this rule; for, if he has any reason for not declaring, as, on account of all the parties not being brought into court, it is the very constant course to apply for time to declare against those who have appeared. We therefore think the plaintiff is out of court as to the two defendants who appeared under the original writ, and that the declaration is irregular as to them, and must be set aside; but, as to the defendant Jackson, who appeared upon a writ returnable in April, the plaintiff is in time to declare, and as against him the proceedings may go on.

Rule absolute.

Saturday, Jan. 31st.

The plaintiff was entitled to a right of way along a water-course from a navigable river to a certain close. The defendants, who were also possessed of land on ei-

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CASE for the obstruction of the plaintiff's right of way. The second count of the declaration stated, that, before and at the time of the committing of the grievances by the defendants as thereinafter mentioned, the plaintiff was, and from thence thitherto had been and still was, lawfully possessed of a certain close of land with the appurtenances, situate in the county of Warwick, and, by reason thereof,

mises, but contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff in that respect, and to deprive him of the use and benefit of his said way, whilst the plaintiff was so possessed of his said close with the appurtenances aforesaid, and so entitled to the said way, to wit, on the 1st January, 1830, and on divers other days and times between that day and the day of the commencement of this suit, in the county aforesaid, wrongfully and injuriously obstructed the said way. By means whereof the plaintiff could not during the time aforesaid, nor can he, have or enjoy his said way as he of right ought to have done; and whereby also the plaintiff hath been and still is hindered from having, enjoying, and occupying his said close in so full and beneficial a manner as he otherwise would and of right ought to have done, to wit, at &c.

The defendant pleaded the general issue.

The cause was tried before Mr. Justice Taunton, at the last Summer Assizes at Northampton. It appeared from the evidence that the plaintiff was possessed of a close at the further end of the drain or watercourse in question, and the defendant of a certain other close situate lower down, between the plaintiff's close and the river Nene; that this watercourse was formerly, and within twenty years, navigable by boats and barges up to the plaintiff's premises; but that of late years the accumulation of mud had so choked it up that it had for about sixteen years ceased to be navigable at all, and remained so at the time of the erection of the obstruction complained of, which consisted of a bridge, with a tunnel under it, across the stream, at a point between the plaintiff's close and the Nene. The learned judge told the jury, that, if they were of opinion, that, at the time the defendants built the bridge and tunnel, the plaintiff was from the accumulation of mud therein unable to use the watercourse, the action was not maintainable. The jury found that the plaintiff had a right of way as stated in the second count of the decla-

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ration, and that the defendants erected the bridge and tunnel complained of; but added "that the passage was before the building of the bridge and tunnel by the defendants obstructed by the mud, so that the plaintiff could not have the use of it:" and thereupon, under the direction of the learned judge, a verdict was entered for the defendants.

Mr. Serjeant *Adams*, in pursuance of leave, obtained a rule nisi to enter the verdict for the plaintiff for nominal damages, or for a new trial on the ground of misdirection.

Mr. *Hill* and Mr. *Miller* shewed cause.—It appears from the evidence that the plaintiff had by his own laches suffered the mud to accumulate to such an extent that the way was impracticable. He has therefore sustained no injury from the erection of the bridge and tunnel: he has never put himself in a situation to be obstructed by them; if they were removed to-morrow, the dyke would be still unnavigable. In Comyns's Digest, "Action upon the Case," (B. 1.), it is said: "It is a general principle of law, that, in order to found an action, there must be damnum cum injuriâ, excepting in some few particular cases. But in

not be evidence against the reversioner.] Mr. Justice J. Parke there says: "To entitle him to maintain this action, it was necessary for the plaintiff to allege and prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious." [Lord Chief Justice *Tindal*.—In *Mason* v. *Hill*, 5 B. & Ad. 1, 2 N. & M. 747, a suggestion is thrown out by the court, that the total or partial abstraction of the water of a watercourse the right to which is in the plaintiff, may be an injury to such a right in point of law, though no actual damage is found by the jury to have been sustained in that respect.] There, the jury found that the plaintiff had sustained damage: here, however, there is no such finding. In *Williams* v. *Morland*, 4 D. & R. 583, 2 B. & C. 910, where the gravamen of an action on the case for disturbing a watercourse, was, that the defendant had erected a dam above the plaintiff's premises, on the river L., and widened another dam, and thereby prevented the water from running in its usual course, and in its usual calm and smooth manner to the plaintiff's premises, and thereby the water ran in a different channel and with greater violence, and injured the banks and premises of the plaintiff, without alleging that he had sustained an injury from the want of a sufficient quantity of water; the jury having negatived any injury to the plaintiff from the causes assigned, but being of opinion that the defendant ought not to keep the water pent up in summer time—it was held that the plaintiff was not entitled to a verdict.

Mr. Serjeant *Adams*, and Mr. *Humfrey*, in support of the rule.—The bridge and tunnel erected by the defendants is a permanent obstruction: the mud may be removed at any time. The question is whether the plaintiff is bound to clear out the mud, and so put the stream into a condition of being used, before he can maintain an action

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for a permanent obstruction of his right of way. The judgment of Mr. Justice Littledale in *Williams* v. *Morland* clearly indicates the distinction between that case and the present, and shews that it was not necessary here to establish a temporal injury. He says: "In actions of trespass it is in general not necessary to prove pecuniary damage to have been sustained, although it be alleged; for, in trespass to land, for instance, if a man wrongfully comes upon the land of another, in point of law damages are considered as consequent, though none be actually sustained. So, if a man has *a right of way, and his right be obstructed or hindered, that will give him a cause of action, although he sustains no pecuniary injury.* The same principle applies to the disturbance of a right of common, where, the injury being to the right which the plaintiff is entitled to exercise from day to day, a cause of action arises, though no actual injury is sustained. This is a settled principle in the cases to which I have alluded: but, generally speaking, there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle the plaintiff to maintain an action on the case. Com. Dig. 'Action upon the Case for a Disturbance,' (A. 1.)." Suppose in this case, the plaintiff's premises were let on a lease—it might not

action—according to the opinion of the judges in *Mason v. Hill*, 5 B. & Ad. 16. In Williams's Saunders, 346 *a*, n., speaking of actions for disturbance of rights of common, it is said: "The declaration in all cases must allege that the plaintiff thereby could not use his common in so ample a manner as he ought to have done—*Mary's* case, 9 Rep. 113, a. And it is there said, that, 'for every feeding by the cattle of a stranger, the commoner shall not have an action upon the case, but the feeding ought to be such per quod the commoner common of pasture for his cattle habere non potuit; so that, if the trespass be so small that he has not any loss, but sufficient in ample manner remains to him, no action lies for it.' But it seems this rule must be understood with some restriction. Undoubtedly, if cattle escape into the common, and are driven out by the owner as soon as he has notice, though the lord may have an action of trespass for the injury to his soil, the commoner cannot bring an action upon the case, for this seems to fall directly within the rule. But, if cattle are permitted to depasture the common, whether they belong to a stranger, or are the supernumerary cattle of a commoner, whether they are driven or escape there, a commoner may have an action upon the case, in which it does not seem necessary for him to prove *any specific injury* which he has sustained. For, the consumption of the grass by the other cattle is of itself a diminution of the right and profit of the commoner, and considered a sufficient proof of the damage alleged in the declaration; for, if the other cattle had not been there, the commoner's cattle might have eaten every blade of grass that was consumed by the other. Therefore it seems sufficient for the plaintiff to prove his right to the common, and that the defendant put upon it cattle, or (if he had another commoner) more cattle than he ought to do. Besides, the law considers that the *right* of the commoner is injured by such an act; and therefore allows him to bring an action

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for it to prevent a wrong-doer from gaining a right by repeated acts of encroachment—*Wells* v. *Watling*, 2 W. Bl. 1233, *Hobson* v. *Todd*, 4 T. R. 71, *Pindar* v. *Wadsworth*, 2 East, 154. For, wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury; and this seems to be a governing principle in cases of this kind. As in the case of *Patrick* v. *Greenway*, tried before Mr. Justice Lawrence, Oxford Spring Assizes, 1796, which was an action of trespass for fishing in the plaintiff's several fishery; it appeared in evidence that the defendant fished there, but did not take any fish, neither was it alleged in the declaration that the defendant caught any fish; the plaintiff obtained a verdict, which in the following term (Easter, 1796,) the defendant moved to set aside; but the court of Common Pleas refused even a rule to shew cause, upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of an using and exercising of the right by the defendant, if such an act were overlooked."

public navigable river called the Nene, and so back again, for himself and his servants, to go, return, pass, and repass in boats at his free will and pleasure; and the plaintiff then assigns as a gravamen that the defendants, knowing the premises, wrongfully and injuriously obstructed the said way, by means whereof the plaintiff could not enjoy it as he of right ought to do. At the trial, the jury, in answer to a question proposed to them by the learned judge, found "that the passage was obstructed before the erection of the bridge and tunnel by the defendants (which was the act complained of), so that theplaintiff could not have the use of it." And upon this finding of the jury the learned judge directed the verdict to be entered for the defendants. It appeared upon the evidence that the plaintiff's close and premises were at the further end of the drain or watercourse, and that the defendants' premises upon which the obstruction was erected were situated between the plaintiff's premises and the river Nene; and it further appeared that the accumulation of mud in the drain between the plaintiff's close and the defendants' premises had been so great, and was so great at the time of the erection of the bridge and tunnel by the defendants, that for the last sixteen years no barge could navigate or pass along that part of the drain or watercourse; and that the defendants had erected the bridge and tunnel across the drain at their own premises, just below the accumulation of mud, in such manner as to render any passage through the bridge and tunnel, even if the mud had been removed, altogether impracticable. The question raised before has been, whether, in this state of circumstances, there was such an obstruction of the right of passage along the watercourse as can form the ground of an action against the defendants. But we think the right to the verdict in this case may be decided upon a narrower ground. The right of navigating through the drain or watercourse from the plaintiff's close to the Nene and back again, is equally

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a right to navigate through the drain from the river Nene to the plaintiff's close and back again: and, upon the evidence in this case, if the plaintiff should endeavour to pass with a boat or barge from the river Nene to his premises, he would be prevented by the defendants' erection from ever arriving so far up the drain as to meet the impediment created by the mud. The plaintiff therefore would, in the strictest construction of the words in the declaration, "be prevented by the defendants' obstruction from enjoying his way as he of right ought to do;" for, he could not get so near his premises as, but for the erection of the tunnel, he might have done. And although this would in fact be but a very small prevention of the exercise of his right, yet it is the principle on which we are to decide, and not the particular state of facts which apply to the present case; for, if the obstruction had been at the very mouth of the drain, and the accumulation of mud had commenced several miles up, and close to the plaintiff's premises, the same argument would have applied; in which case it is obvious that the damage to the plaintiff by such an intervening obstruction might have been very great. Upon this ground, therefore, we think the case must go down to

sion (*a*). The plaintiff's premises would sell for less whilst the tunnel is in existence, if now put up to sale. And indeed there seems no legal ground upon which the facts relied on by the defendant can constitute an answer to the charge upon the record. As a plea of denial of the charge, they would not support it; for, the tunnel was erected by the defendants, and the erection is such as effectually to prevent barges from passing through it, whether they can come up to it or not. Again, if put upon the record as a plea in bar, they would amount to a confession of the charge, without being an avoidance; for, it is no excuse to the defendants that the plaintiff has voluntarily suffered an accretion of the mud, which he might remove at any time he thought fit. The voluntary suspension by the plaintiff of his exercise and enjoyment of a right can form no justification to the defendants for preventing him from the possibility of enjoying it. Upon the more general ground, therefore, that the erection of the bridge and tunnel is an immediate injury to the plaintiff by putting his right into hazard, and by preventing the actual enjoyment of it whenever he thinks fit to resume it, independently of the narrower ground on which we first relied, we think this action maintainable, and that the rule for a new trial must be made absolute.

Rule absolute, for a new trial (*b*).

(*a*) Jesser v. Gifford, 4 Burr. 2141.

(*b*) On the second trial, before Mr. Justice Littledale, at the Spring Assizes for Northampton, 1835, the plaintiff was a second time nonsuited—on the ground that there was no evidence given that any boat or barge of the plaintiff's, or that any hired servant of the plaintiff's with a boat or barge, had ever passed along the watercourse. In Easter Term a rule nisi was obtained for a new trial on the ground of misdirection, which will probably come on for argument in the course of Michaelmas Term next.

1835.

Monday, Jan. 26th.

The jury having given damages (under 20*l.*) in an action by landlord against tenant, for an injury to the former arising from the tenant quitting premises occupied by him as tenant from year to year without having done repairs he was bound to do—The court refused to disturb the verdict, although it appeared that the larger portion of the repairs required ought to have been done by the landlord himself.

Woods *v.* Pope.

THIS was an action brought by a landlord against a tenant from year to year, for rent, and for money expended in repairs which the tenant was bound to perform, and damages sustained by the plaintiff in being deprived of the beneficial use of the premises during the time occupied in repairing. The defendant paid into court the amount claimed for rent and repairs. At the trial it appeared, that, in consequence of the dilapidated state in which the defendant had left the premises, the plaintiff was for some months unable to let them: but that part of that time was employed in the performance of substantial repairs. The jury returned a verdict for the plaintiff, damages 13*l.* 10*s.*

Mr. *Humfrey*, in pursuance of leave, moved to set aside the verdict and enter a nonsuit.—He submitted that the evidence shewed that the plaintiff's inability to let the premises arose principally from his own default.

Per Curiam.—The verdict being under 20*l.*, we ought not to interfere unless satisfied that it is manifestly against

In the Common Pleas.

EASTER TERM, 5 WILL. IV.

1835.

Thursday, April 16th.

In order to ground an attachment for non-payment of costs pursuant to a rule of court or the prothonotary's allocatur, there must in all cases be a personal service, unless it appears that the rule or allocatur has been seen in the actual possession of the party.

Dicas *v.* Warne.

In Trinity Term last, a rule for striking off the roll the attorney for the defendant in this cause was discharged, on the terms of payment by him of all the costs of and occasioned by the proceedings. The costs were accordingly taxed, and the prothonotary's allocatur obtained; but the plaintiff was unable to effect a personal service of it.

Mr. *F. V. Lee*, upon an affidavit suggesting that the attorney kept out of the way to avoid service of the allocatur, moved that personal service might be dispensed with. He cited *Green* v. *Prosser*, 2 D. P. C. 99, where, a person keeping out of the way to avoid being served personally with a rule, preparatory to obtaining an attachment against him, and it being clearly made out to the satisfaction of the court, personal service was dispensed with.

Mr. *Humfrey*.—*Green* v. *Prosser* is virtually overruled in *Stunnell* v. *Tower*, 1 C. M. & R. 88, where Lord Chief Baron Lyndhurst says: "It is much better in cases of this kind, where the liberty of the subject is so deeply concerned, to adhere to the strict rule that personal service should be required." And his lordship added "that the

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court was the more anxious to lay down this rule, as the case cited (*Green* v. *Prosser*) might be supposed to authorize a less strict practice."

Lord Chief Justice TINDAL.—The practice upon the subject is thus stated in Archbold, 3rd edit. 934—"The rule as now understood, and more especially since the late rule of all the courts of Hilary Term, 2 Will, 4, r. 51, seems to be that a personal service will not be dispensed with, unless indeed it appears that the rule has been seen in the actual personal possession of the party who should have been served with it, or under some very strong facts (*a*)." Perhaps an acknowledgment by the party that it has come to his hands would suffice: but, in all other cases, it seems personal service cannot be dispensed with.

The rest of the court concurring—

Rule refused.

(*a*) And see Tidd's Practice, 9th edit. 500—citing Anonymous, 1 Chit. R. 503, and In re ——, 1 D. & R. 529.

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CUMMING v. PULLEN.

Mr. *Mansel*, contra, submitted that notices of trial and notices of inquiry being excepted out of the rule, it must have been intended not to apply to notices of justification.

Mr Justice VAUGHAN.—The words of the rule are general: the exception of notices of trial and of inquiry confirms it. I think this notice is irregular.

Bail rejected (*c*).

(*c*) In Hall v. Welchman, 2 C. & J. 472, a quo minus was returnable on Saturday, the 21st of April, being the day before Easter Day; upon which ground it was moved to set it aside. The court took time to consider, and, having conferred with the other judges, refused the rule. And see Lilly v. Gompertz, 1 D. P. C. 376.

ROWLAND *v.* HALL.

Thursday, April 23rd.

A., a clerk to justices, verbally agreed to permit B. to act in lieu of him, and to allow him half the fees of the office, provided C. and D. should say he ought to do so. C. and D. were consulted, and they approved of this arrangement. B. having acted as clerk—Held, that he might maintain an action for money had and received for half the fees received by A.

ASSUMPSIT for money had and received. Plea—non assumpsit. At the trial before Mr. Justice Park at the last Assizes at Reading, it appeared that the plaintiff and defendant were both attornies; that the defendant had for some years acted as clerk to the magistrates for the Hungerford Division of the county of Berks; that, on his attending at a licensing meeting of the magistrates, the plaintiff claimed to act as clerk, and the magistrates present insisted that he should so act and that the defendant should permit him to receive one half the clerk's fees; that the defendant consented to this arrangement, provided two persons whom he named should say that he ought; and that those persons, on being consulted, did say that the wish of the magistrates should be complied with. The plaintiff accordingly brought this action for his proportion of the fees received by the defendant. Under the direc-

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tion of the learned judge, the jury found a verdict for the plaintiff for 10*l.*

Mr. Serjeant *Talfourd*, in pursuance of leave reserved at the trial, now moved that this verdict might be set aside and a nonsuit entered.—The clerk is the officer of the division, not of the individual magistrates—9 Geo. 4, c. 61, s. 15. The plaintiff had not been appointed a joint clerk with the defendant, therefore the fees received by the latter never could be money had and received to the use of the former: and the promise by the defendant to abide by the determination of the individuals named by him was without consideration and void.

Lord Chief Justice TINDAL.—I think we ought not to interfere. This is not an action brought for the purpose of trying the right to the office. The plaintiff rests upon the specific agreement entered into by the defendant, who assented to the proposition of the magistrates provided two gentlemen thought he ought to do so. It appears that those persons were consulted, and that they expressed an opinion that the defendant should give up a portion of

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SMITH and Another, Assignees of WHALLEY, a Bankrupt, v. CRAMER.

Friday, April 24th.

Upon an issue whether or not a trader had committed an act of bankruptcy on or before the 5th March, letters written by him on the 16th January to the holders of bills to become due in February, praying for time, were held admissible for the purpose of shewing him to be in embarrassed circumstances, and as tending to give a colour to his absenting himself from his home and business from the 16th February to the 9th March.

THE issue to be tried in this case was whether or not Whalley had committed an act of bankruptcy on or before the 5th March, 1834. It was proved, on the part of the plaintiffs, that Whalley was in a state of embarrassment at the close of 1833; that on the 26th December in that year an execution was in his house, but, the creditors at whose suit it had issued agreeing to suspend the sale of his goods, he continued to carry on his business (that of a wholesale shoemaker and draper) as usual; and that, on the 16th February, 1834, he left his place of abode at Stafford, and did not return until the 9th of March. In order to shew that the probable motive of this absence was to avoid his creditors, the plaintiffs produced two letters written by Whalley on the 16th January, and addressed to two individuals who were the holders of acceptances of his that would become payable in the course of the following month, praying for an extension of credit. It was objected, for the defendant, that these letters were not admissible in evidence; and it was contended that declarations of a bankrupt explaining his intention in pursuing any given course, to be evidence, must be contemporaneous with the act in explanation of which it is sought to use them, or so connected with it as to make them substantially a part of the same transaction; whereas here the letters in question were dated a month prior to the commencement of the absence of Whalley, and were not shewn to be in any way connected with it. Mr. Justice Park, before whom the cause was tried, allowed the letters to be read, as declarations by the bankrupt tending to explain in some degree his motive for absenting himself. A verdict having been found for the plaintiff—

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Mr. Serjeant *Ludlow* moved for a new trial, on the ground urged at the trial. He submitted that these letters had been improperly received, and cited *Lees* v. *Martin*, 1 M. & Rob. 210, where declarations made by a trader shortly after an absence were held not to be admissible to prove such absence an act of bankruptcy.

Lord Chief Justice TINDAL.—It appears to me that the letters in question fall within the rule authorizing the admission of anything said or written by the bankrupt before his bankruptcy tending to shew quo animo an act equivocal in itself was done by him. They were clearly admissible for the purpose of shewing that the bankrupt was a needy man, and might fairly operate upon the minds of the jury to give a colour to his absence from his home and business.

The rest of the court concurring—

Rule refused.

Friday, April 24th

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one George Adams of the one part, and one Alexander Fairweather of the other part—profert—Adams did demise, lease, set, and to farm let unto Fairweather a certain close, field, piece or parcel of land or ground, with the appurtenances thereto belonging, and therein particularly described, and the barn, stable, and buildings, standing and being thereon, situate &c., habendum to Fairweather, his executors, administrators, and assigns, from the 29th September then last past for the term of twenty-five years, at a certain rent payable by Fairweather to Adams, his heirs and assigns, as in the said indenture was mentioned: and the said Adams did in and by the said indenture, for himself, his heirs and assigns, covenant, promise, and agree to and with Fairweather, his executors, administrators, and assigns, that he Adams, his heirs or assigns, should and would at the end of the term pay unto Fairweather, his executors, administrators, and assigns, at a fair valuation and appraisement, for all such erections and buildings as should be erected, built, or set up on the premises at any time during the term, by Fairweather, his executors, administrators, and assigns, such valuation and appraisement to be made by two appraisers, &c., provided such valuation and appraisement so to be made in manner aforesaid did not exceed 150*l.*, but not beyond that amount; and also should and would in like manner pay for all such trees and bushes as Fairweather, his executors, administrators, and assigns, should or might at any time during the term thereafter plant on the premises thereby demised, and as should be standing and growing thereon at the end of the term, &c.—prout patet. The count then proceeded to state that Fairweather entered into and upon the demised premises; that he afterwards assigned them to one Charles Kennett; that Charles Kennett assigned them to one Samuel Kennett; that Samuel Kennett assigned to Clews, Sexton, & Robinson, who, on the 14th August, 1832, by indenture, did bargain, sell, assign, transfer, and set over unto the plaintiff, his

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executors, administrators, and assigns, all and each and every of the said demised premises, with the appurtenances, to have and to hold the same unto the plaintiff, his executors, administrators, and assigns, for all the residue of the said term of twenty-five years. That, after the making of the said indenture of demise of the 8th October, 1807, and during the said term thereby granted, to wit, on the 14th June, 1810, at &c., *the next and immediate reversion, right, title, and interest of Adams, of, in, and to the demised premises, with the appurtenances, expectant on the determination of the said demise, by assignment thereof then and there legally came to and vested in the defendant;* whereupon and whereby the defendant then and there became and was seised of the said reversion, to wit, in his demesne as of fee, and continued so seised until and at the expiration of the said term granted by the said indenture of demise, to wit, at &c., and at the expiration of the said demise the defendant entered into and upon all and singular the demised premises with the appurtenances, and became and was seised and possessed thereof. That, after the making of the said indenture of demise, and on divers days and times during the said term, Fairweather, C. Kennett, S.

& Robinson, and the plaintiff, respectively, whilst they were so respectively possessed of and interested in the said demised premises as aforesaid, to wit, at &c., did plant on the said premises within the true intent and meaning of the said indenture, divers, to wit, twenty thousand trees and twenty thousand bushes, and the same trees and bushes at the end of the said term and from thence hitherto were and had been standing and growing upon the demised premises, and whereof the defendant before and at and after the expiration of the term always had notice, to wit, at &c.; and thereupon under and by virtue of the said indenture of demise and in pursuance of the covenant in that behalf, to wit, on &c., at &c., the plaintiff duly appointed a certain appraiser, to wit, J. W., on his part and behalf to value and appraise the said erections and buildings so erected, built, and set up as aforesaid, and the said trees and bushes, whereof the defendant then and there had notice; and thereupon the defendant also, under and by virtue of the said indenture of demise, and in pursuance of the covenant in that behalf, afterwards, to wit, on &c., at &c., duly appointed a certain other appraiser, to wit W. C., on his part and behalf to value and appraise the same erections and buildings and the said trees and bushes; and thereupon the said W. C. and J. W., as such appraisers as aforesaid, and having been so duly appointed and authorised by the defendant and the plaintiff in that behalf, afterwards, to wit, on &c., at &c., did duly value and appraise the said erections and buildings so erected, built, and set up as aforesaid, and so then remaining in and upon the demised premises as aforesaid, at the sum of 90*l.*, and did also then and there duly value and appraise the said trees and bushes so planted on the premises and so then standing and growing thereon as aforesaid, at the sum of 1721*l.* 9*s.* 6*d.*, of all which premises the defendant had notice. Averment of performance. Breach—nonpayment of the 90*l.* or 1721*l.* 9*s.* 6*d.*, or either of them, or any part thereof.

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The only material issue was that raised by the first plea, which stated that the next and immediate reversion, estate, right, title, and interest of the said George Adams of in and to the premises in the declaration mentioned, and therein alleged to have been demised by Adams, with the appurtenances, expectant on the determination of the said demise, *did not, by assignment thereof, legally come to or vest in the defendant*, modo et forma.

The cause was tried before Lord Chief Justice Tindal, at the Sittings at Westminster after the last Michaelmas Term. The facts that appeared in evidence were as follow:—One George Adams, being seised in fee of certain lands in the county of Middlesex, demised them, by an indenture bearing date the 8th October, 1807, to Alexander Fairweather for the term of twenty-five years. This indenture contained the covenant for the breach of which this action was brought. The term thereby granted was by various mesne assignments vested in the plaintiff; and, on its expiration, the buildings and trees erected and planted during the continuance of the term were valued by persons nominated by the plaintiff and defendant respectively, in pursuance of the covenant referred to, at the sums mentioned in the declaration; but the defendant refused to pay the amount—con-

of them, to have and receive the said *clear* rents and profits of the said fourth part of all my said devised real estates, and, whilst there shall be more than one of them living, in equal parts and proportions, share and share alike; and, from and after the several deceases of my said wife and son and daughters, George, Elizabeth, and Mary, then, as to the said fourth part of all my said devised real estates, in trust for such person or persons as, at the decease of the last survivor of my said son George and daughters Elizabeth and Mary, shall be the heir or heirs of such survivor, his, her, or their heirs and assigns—And, as to one other fourth part of and in all *my said devised real estates*, upon trust to pay to *or* permit and suffer my said son George Adams to have and receive the *clear* yearly rents, issues, and profits thereof for and during the term of his natural life; and, from and after his decease, in trust, as to the same fourth part of all my said devised real estates, for the eldest or only son (as the case may be) of my said son George who shall be living at his decease, his heirs and assigns; and, if he my said son George shall not leave a son surviving him, then in trust for such person or persons as at the decease of my said son George shall be his heir or heirs, and his, her, or their heirs and assigns—And, as to one other fourth part of and in all my said devised real estates, upon trust to pay to *or* permit and suffer my said daughter Elizabeth Wright, wife of the said W. Wright, to have and receive the *clear* yearly rents and profits thereof for and during the term of her natural life; and, from and after her decease, in trust, as to the same fourth part of all my said devised real estates, for the eldest or only son (as the case may be) of my said daughter E. Wright who shall be living at her decease, his heirs and assigns; and, if she my said daughter E. Wright shall not leave a son surviving her, then in trust for such person or persons as at the decease of my said daughter E. Wright shall be her heir or heirs, and his,

Devise to George Adams, the son.

Devise to testator's daughters.

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her, or their heirs or assigns—And, as to, for, and concerning the other or remaining fourth part of and in all my said devised real estates, upon trust to pay to or permit and suffer my said daughter Mary Adams to have and receive the clear yearly rents, issues, and profits thereof for and during the term of her natural life; and, from and after her decease, in trust, as to the same fourth part of all my said devised real estates, for the eldest or only son (as the case may be) of my said daughter Mary Adams who shall be living at her decease, his heirs and assigns; and, if she my said daughter Mary Adams shall not leave a son surviving her, then in trust for such person or persons as at the decease of my said daughter Mary Adams shall be her heir or heirs, and his, her, or their heirs and assigns. And I hereby declare it to be my will and meaning that the several parts and shares of my said wife and daughters in the rents and profits of my before devised real estates are and shall be for their respective sole and separate uses whilst under coverture, and shall be paid into their own hands or to such person or persons as they respectively shall from time to time, by writing under their hands, order, direct, or appoint, and that their receipts

Shares of wife and daughters to be to their sole and separate uses.

[redacted]

vivor, from time to time, in their own judgment and discretion, *to let and set my said devised real estates* for such term or terms of years, not exceeding seven years, and on such conditions, always reserving the best and most improved yearly rent or rents which under all circumstances can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift for the making thereof; but so nevertheless as that there be contained in every such lease a condition of re-entry on non-payment of the rent or rents to be thereon or thereby respectively reserved by the space of twenty-one days next after the same shall become due and payable; and so as the lessee or lessees to whom such lease or leases shall be made, seal and deliver a counterpart or counterparts of such lease or leases. And my will further is, and I do direct my said trustees and the survivor of them, and the heirs and assigns of such survivor, during the continuance of the trusts hereinbefore declared of and concerning my said devised real estates, by, with, and out of the rents, issues, and profits thereof, to pay and discharge all outgoings for taxes or otherwise in respect of the premises, and to keep the premises in repair."

and out of the rents &c. to pay all outgoings for taxes &c., and to keep the premises in repair.

"And my will further is, and I do direct and declare, that, upon the decease of my said trustees, or either of them, or of any other trustee to be appointed by virtue of this authority, or upon his or their refusing, declining, or becoming incapable to act in the trusts, a new trustee or trustees shall be appointed in his or their place and stead by the surviving or continuing trustee, or the executors or administrators of the surviving trustee; and thereupon the trust estates and premises shall be conveyed to and vested in the surviving or continuing and the newly-appointed trustee or trustees jointly; and, in case there shall be no surviving or continuing trustee or trustees, then in such newly-appointed *trustee* or trustees and their heirs, upon the several trusts, and to and for the several ends,

Power to appoint new trustees.

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intents, and purposes, and under and subject to the powers, provisoes, and directions hereinbefore mentioned, expressed, and declared of and concerning the same, or such of them as shall be then subsisting or capable of taking effect; and that every such new trustee shall and may act therein as if he had been herein by me appointed."

Appointment of defendant as trustee, and conveyance to him.

George Adams, the testator, died in the beginning of the year 1810. On the 16th and 17th November, 1818, Ringham, one of the trustees, being dead, Sutor, the surviving trustee, by indenture of lease and release, made between Sutor of the first part, Catherine Adams (the testator's widow), George Adams (the son), W. Wright and Elizabeth his wife (one of the testator's daughters), and J. T. Boydell and Mary his wife (the other daughter of the testator), of the second part, and the defendant of the third part—reciting the will of George Adams the testator, the death of Ringham, and that Sutor had refused to act further in the trusts of the will of George Adams, deceased, and with the privity and approbation of Catherine Adams, George Adams, party thereto, &c., he had agreed to appoint the defendant, party thereto, to be a new trustee in the stead and place of Joseph Ringham,

Ringham and Sutor, their heirs and assigns, upon the trusts therein mentioned, and in part thereinbefore set forth, to hold to the defendant, his heirs and assigns, upon the several trusts &c. declared concerning the same by the said recited will of the said George Adams deceased."

On the part of the defendant, it was contended—first, that the legal estate in the reversion in fee in the demised premises, at least as to one fourth, did not vest in the defendant, the use as to that part being executed in George Adams, the son—secondly, that the power of appointing new trustees under the will was not properly exercised by the lease and release of the 16th and 17th November, 1818. His lordship reserved these points, and directed the jury to find a verdict for the plaintiff, which they accordingly did for 1714*l.*

Mr. Serjeant *Taddy*, in Hilary Term, obtained a rule nisi to set aside the verdict and enter a nonsuit, on the grounds —first, that the legal estate, at least as to one fourth (the share devised to the son George Adams, and his heirs), was in the devisee, and not in the trustees—secondly, that the power of appointment contained in the will was not duly executed by the conveyance by Sutor to the defendant.—He cited *Doe* d. *Liecester* v. *Biggs*, 2 Taunt. 109, where it was held that a devise to one upon trust to pay to or to permit and suffer the testator's niece to receive the rents and profits, passed the legal estate to the cestui que trust.

Mr. *Smirke* shewed cause.—The testator by his will devised certain property to Ringham and Sutor, their heirs and assigns, upon trust, as to one fourth, to his widow; as to another fourth, to his son George, with a contingent remainder; as to another fourth, to his daughter Elizabeth Wright; and, as to the remaining fourth, to an unmarried daughter: the shares of the females being to their sole

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and separate use. As to three fourths, therefore, the use clearly is executed in the trustees. With respect to the undivided fourth devised to the testator's son, it is contended, upon the authority of of *Doe* d. *Liecester* v. *Biggs*, that the use is executed in him. In that case, the will contained a simple devise to the trustees in trust to permit and suffer the devisee to receive the rents and profits, with nothing to control its effect, and nothing to shew that the testator intended to give her less than a fee. Lord Mansfield says: "This case might be argued and considered for ever without advancing it at all in law, reason, or precedent. But, as it happens, in this will the last words are 'permit and suffer,' which give the cestui que trust a legal estate; and the general rule is, that, if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail; and, consequently, *for want of a better reason*, we are forced to say that we think this will gives the legal estate to the party beneficially interested." Here, the devise is of a fourth of the *clear* yearly rents and profits; and the trustees are empowered to demise the whole, and are directed "to pay and discharge all outgoings, for taxes or otherwise, in respect of the premises, and to keep the pre-

:ion of some other persons for the purposes of the act:"
ı action of ejectment, it was held that the conveyance
prize to the lessor of the plaintiff by four only of the
trustees (one having died) was valid and effectual in a
t of law—*Doe* d. *Read* v. *Godwin*, 1 D. & R. 259.
l Chief Justice Abbott there said, " that the directions
ıe statute in this respect were analogous to the powers
ained in a private settlement, to fill up the vacancies
sioned by death, for the execution of the trust; and
, though this authority was of a higher character, in-
ıch as it was under the directions of an act of parlia-
t, and therefore more imperative, yet still, as the es-
remained in the surviving trustees, there might be a
l conveyance by them." [The court here intimated a
ı to hear—

[r. Serjeant *Taddy* and Mr. *Erle*, in support of the
.—Without over-ruling *Doe* d. *Leicester* v. *Biggs*, the
:t cannot upon the construction of this will hold that
use was executed in the trustees as to the entire sub-
matter of the devise. That case was argued at very
ıiderable length, and, after time taken to consider, Sir
ıes Mansfield says, that, as the last words of the will
" permit and suffer," and the general rule is, that, if
:e be a repugnancy, the first words in a deed, and the
words in a will, shall prevail, the court felt themselves
nd to say that the will gave the legal estate to the
:y beneficially interested. It is always expedient to
ere as much as is practicable to general rules. It may
ıdmitted, that, as to three fourths of the estates, it
necessary that the trustees should be clothed with
legal estate; the will containing devises to the sepa-
: use of females, and trusts and directions that could
otherwise be carried into effect—*Jones* v. *Lord Say
Sele*, 2 Vin. Abr. 262, Eq. Cas. Abr. 383; *Harton* v.
rton, 7 T. R. 263. But, with respect to the fourth

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devised to George Adams, the son, it never could have been the intention of the testator so to tie up the property as to prevent him or his son from disposing of it in any manner they might think fit. The general object and policy of the law is in all possible cases to give a legal estate to the first taker: and there will be no inconsistency or inconvenience in holding that the use is executed as to one fourth in George Adams, and as to the remaining three fourths in the trustees.

Then, the appointment of a new trustee made by the deed of November, 1818, was not made in the way directed by the will. The testator evinces an anxiety to prevent the property from coming into the hands of a single individual. By the law of England, a devise to two persons and their heirs vests the property in the heirs of the survivor. The testator, aware of this, in order to avert the effect of survivorship, directs that, in the event of the death of the trustees, or either of them, or upon his or their declining or becoming incapable to act in the trusts, a new trustee or trustees shall be appointed in his or their place and stead by the surviving or continuing trustee, or the executors or administrators of the surviving

and immediate reversion of the premises vested in the defendant. I agree that the only party to be charged in this action is the party in whom the immediate legal reversion vested, according to the evidence given in the cause. It is contended on the part of the defendant, that we must upon that evidence hold that the interest of the lessor did not vest in the defendant: and this on two grounds—first, it is contended that the interest conveyed to the trustees by the will of George Adams, the father, was not a legal interest, at least as to one part, the use as to which was by the will executed in George Adams, the son, one of the cestuis que trust—secondly, that, even if the legal estate in the entirety vested in the trustees, the appointment by Sutor, the surviving trustee, was not made according to the power conferred by the will, and consequently nothing passed thereby to the defendant. The first question, therefore, that we have to determine, is, whether the use was executed in the trustees or in the cestui que trust. Looking at the will, I am of opinion that we shall not be giving effect to the intention of the testator unless we hold that the use was executed in the trustees at least during the coverture of the testator's daughters. It is contended (and for the purpose of the argument may be admitted), that, if as to any part of the estate devised the legal estate is found not to be vested in the trustees, that would warrant a finding for the defendant: therefore the argument has been confined to the operation of the devise to the son, George Adams; and as to his share it is said the use is executed in him. It is to be observed that the devise is a general devise "to Joseph Ringham and Thomas Sutor, their heirs and assigns," upon certain trusts. The testator then proceeds to separate the property into undivided fourth parts. The devise to the son, George Adams, is in these terms: "As to one other fourth part of and in all my said devised real estates, upon trust *to pay to* or *permit and suffer* my said son George

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Adams *to have and receive* the *clear* yearly rents, issues, and profits thereof for and during the term of his natural life; and, from and after his decease, in trust, as to the same fourth part of all my said devised real estates, for the eldest or only son (as the case may be) of my said son George who shall be living at his decease, his heirs and assigns; and, if my said son George shall not leave a son surviving him, then in trust for such person or persons as at the decease of my said son George shall be his heir or heirs, and his, her, or their heirs and assigns." It is said, that, as the testator has used the words "pay to or *permit and suffer my said son George Adams to have and receive*" &c., the case is governed by that of *Doe* d. *Leicester* v. *Biggs*, where, the same option being given, the court say: "As it happens, in this will, the last words are 'permit and suffer,' which give the cestui que trust a legal estate; and the general rule is, that, if there be a repugnancy, the first words in a deed and the last words in a will shall prevail; and, consequently, for *want of a better reason*, we are forced to say that we think this will gives the legal estate to the party beneficially interested." It is to be observed, that the court came to that conclu-

ndant were to prevail, we must come to this us conclusion—that, as to three undivided fourth the property, the use is executed in the trus- d, as to the other, in George Adams, the son. ould that be reconcileable with the subsequent to the trustees, "to let and set the said de- al estates for such term or terms of years, not g seven years, and on such conditions, always the best and most improved rent or rents which l circumstances can or may be reasonably had for the same?" If the son were in possession ndivided fourth, how could the trustees comply direction? Who would take a lease of the three g undivided fourths? The testator then goes on the "trustees and the survivor of them, and s and assigns of such survivor, during the con- of the trusts hereinbefore declared of and con- he said devised real estates, by, with, and out of , issues, and profits thereof, to pay and discharge ings for taxes or otherwise, in respect of the , and to keep the premises in repair." How could tees execute this part of the trust, if George he son, were in possession of a part of the de- ate? If they were to repair the whole of the , they would be giving him a larger proportion of e than the other cestuis que trust. Looking, , at the will, I am of opinion that it would be le to carry into effect the whole intention of the without holding the use to be executed in the as to the whole of the estate. And this will be agree with the rule laid down in 2 Wms. Saund. 'Where something is to be done by the trustees kes it necessary for them to have the legal estate, payment of the rents and profits to another's use, or of the debts of the testator, or *to pay l taxes, and keep the premises in repair*, or the

Beauclerc, 3 B. & P. 175, also seems to me to bear very much upon the present case. Lord Alvanley there cited from Wms. Saund. the passage where it is laid down as the result of all the cases, that, "where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate." The very words of that note are used in this will. For the reasons stated by my Lord Chief Justice, I think we can make no distinction between the fourth share devised to George Adams, the son, and the other three fourths. And, as to the lease and release, it is enough to say, that I think it is satisfactorily explained by his lordship.

Mr. Justice GASELEE.—There are two material points wherein this case differs from *Doe* d. *Leicester* v. *Biggs*—the one, that there the testator does not as here devise the *clear* yearly rents; the other, that there the words "permit and suffer" were the last words of the will, and here they are not. In what situation would these trustees be placed if as to one fourth the fee were held to be vested in the son, and as to the other three fourths in them? Constant disputes must inevitably result. I am clearly of opinion, that, to carry into effect the intention of the testator, it is necessary that the legal estate in the whole of the devised estate should vest in the trustees.—Upon the second point, I am of opinion that the defendant, having accepted the conveyance from Sutor, is estopped from saying that he had not the legal estate. It is enough to say that the defendant is by his own act assignee of the reversion in question.

Mr. Justice BOSANQUET.—I am of the same opinion. The question is whether or not the legal estate in the pro-

parcel of ground situate in the county of Surry, with such buildings as should be erected and built thereon by the plaintiff and his assigns; and upon which said piece or parcel of ground certain buildings, to wit, two messuages, were afterwards and before the making of the said promise and undertaking erected and built by one George Sutton to whose order it had been and was agreed by and between the plaintiff and the said G. Sutton that such lease should be granted upon repayment by him the said G. Sutton to the plaintiff of divers sums of money amounting in the whole to a large sum of money, to wit, the sum of 350*l.*, in which he the said G. Sutton was then indebted to the plaintiff for money lent and materials supplied by him to the said G. Sutton, and by him used and disposed of in and about the erection and completion of the said buildings; and whereas also the said G. Sutton theretofore, and before the making of the promise of the defendant hereinafter mentioned, had sold and disposed of his the said G. Sutton's interest in the said piece or parcel of ground and the building so thereon erected and built as aforesaid to the defendant, and the said sum of 350*l.* in which the said G. Sutton was so indebted to the plaintiff as aforesaid was at the time of making the said promise wholly unpaid and unsatisfied; of all which premises the defendant had notice: and thereupon, theretofore, to wit, on the 8th May, 1834, in consideration that the plaintiff, at the request of the defendant, would grant or cause to be granted to him the defendant a lease of the said piece or parcel of ground, with the buildings erected thereon by the said G. Sutton, he the defendant then undertook and promised the plaintiff to deliver, with the consent of the said G. Sutton, to the order of the plaintiff, timber and deals then being part of certain stock theretofore purchased by the said G. Sutton, and then lying at the Belvidere Wharf, to the value of 350*l.*, at the prices mentioned or referred to in a certain agreement theretofore made between the defendant and the said G. Sutton: and the plaintiff averred that he, con-

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fiding in the said promise and undertaking of the defendant, did afterwards, to wit, on the day and year aforesaid, cause the said Peter Paterson to grant, and he the said Peter Paterson did then grant to the defendant a lease of the said piece or parcel of ground with the buildings erected thereon by the said G. Sutton as aforesaid; and, although the said G. Sutton did then consent and agree that the defendant should deliver to the plaintiff such timber and deals as aforesaid, to the value aforesaid, whereof the defendant afterwards to wit on the day and year aforesaid had notice and was then and often afterwards requested by the plaintiff to deliver to the order of him the plaintiff such timber and deals as aforesaid: yet the defendant, not regarding his said promise and undertaking so by him made as aforesaid, but contriving and wrongfully intending to deceive and defraud the plaintiff in this behalf, did not nor would when he was so requested as aforesaid, or at any time before or afterwards, deliver to the plaintiff or to his order such timber and deals as aforesaid, or any part thereof, but he to do this had hitherto wholly refused and still did refuse, whereby the plaintiff had not only lost and been deprived of all the profit, benefit, and advantage which would have arisen and accrued to

deration for the defendant's agreement, inasmuch as the plaintiff was bound by an agreement entered into between him and Sutton, dated the 4th May, 1834, to assent to the lease being granted by Paterson to Sutton's nominee; and also that Sutton had committed a prior act of bankruptcy, and consequently that, supposing the undertaking by the defendant to be conclusive and binding upon him, still the plaintiff could only be entitled to nominal damages, inasmuch as the delivery of the timber and deals to the plaintiff must have taken place under such circumstances as would have entitled Sutton's assignees to recover them back from the plaintiff in an action of trover. Lord Chief Justice Tindal, before whom the cause was tried at the Sittings in London after the last term, was of opinion that such evidence was not admissible under the general issue, and therefore rejected it. A verdict was thereupon taken for the plaintiff for 350*l.*

Mr. Serjeant *Talfourd* now moved for a new trial, on the ground that the evidence tendered had been improperly rejected.—In contemplation of law, the consideration is part of the promise. By the rules of Hilary Term, 4 Will. 4, Assumpsit, 1, it is provided, that, "in all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach." So, here, the promise was not made upon the consideration alleged in the declaration: it was without consideration; for, the supposed consideration stated in the declaration is in substance a *consent* by the plaintiff to grant to the defendant (Sutton's nominee) a lease which the plaintiff was *bound* to grant to Sutton or his nominee upon a certain contingency, viz. the repayment to the

of covenant—1. For non-repair of the demised premises—2. For not repairing &c. the hedges and fences—3. For not manuring meadow land within one month after mowing—4. For non-payment of increased rent for breaking up and converting into tillage part of the land comprised in the indenture, according to the covenants therein contained. The defendant pleaded three pleas to the first breach, two to the second, two to the third, and four to the last breach. The plaintiff demurred to the first and ninth pleas, joined issue on the second, third, fourth, fifth, sixth, seventh, eighth, and eleventh pleas, and replied to the tenth. The defendant joined in demurrer to the first and ninth pleas, and joined issue on the replication to the tenth plea. *Before the issue was made up* the cause was referred to an arbitrator, by articles of agreement, whereby the parties agreed to refer "all the matters in the suit, specified in the amended particulars" delivered in the cause: the costs of the suit to abide the event of the award, and the costs of the reference and the award to be in the discretion of the arbitrator. The particulars referred to in the agreement were as follow:—

"The following is and are the amended, further, and better account and particulars of the want of repair of the buildings, and of the penalties and additional or increased rent claimed from the defendant by the plaintiff, and of the breaches of covenant for which this action is brought:—

"*Repair of the buildings.*—For not repairing and keeping and leaving on the 11th of October, 1832, in good, substantial, and tenantable repair and condition, the walls of the premises comprised in the indenture of lease in the declaration mentioned, for which the plaintiff claims the sum of 10*l.*

"*Penalties.*—The sum of 112*l.*, being the penalty of 2*l.* per rod for neglecting and not preserving and keeping, nor leaving on the 11th of October, 1832, in good order and condition, the hedge or living fence of the length of

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fifty-six rods between the fields called the fifteen acres and eighteen acres, being part of the premises comprised in the indenture of lease in the declaration mentioned.

"The sum of 146*l.*, being the penalty of 2*l.* per rod for neglecting and not preserving and keeping, nor leaving on the 11th of October, 1832, in good order and condition, the hedge or living fence of the length of seventy-three rods between the fields called the eighteen acres and the horse pasture, being other part of the said premises.

"The sum of 96*l.*, being the penalty of 2*l.* per rod for neglecting and not preserving and keeping, nor leaving on the 11th of October, 1832, in good order and condition, the hedge or living fence of the length of forty-eight rods between the fields called the horse pasture and the little barn field, being other part of the said premises.

"The sum of 86*l.*, being the penalty of 2*l.* per rod for neglecting and not preserving and keeping, nor leaving on the 11th of October, 1832, in good order and condition, the hedge or living fence of the length of forty-three rods between the fields called the little barn field and the lane between the hedges, being other part of the said premises.

"The sum of 90*l.*, being the penalty of 2*l.* per rod for neglecting and not preserving and keeping, nor leaving on

the hedge or living fence of the length of thirty rods between the fields called the three acres and the upper seven acres, being other part of the said premises.

"The sum of 575*l.*, being the penalty of 20*l.* per acre for not manuring within one month after mowing, in the year 1832, 28*a.* 3*r.* 0*p.*, being one-third part of the meadow lands comprised in the said indenture of lease.

"*Additional or increased rent.*—The sum of 525*l.*, due 11th of October, 1832, being one year and a half's additional or increased rent of 350*l.* per annum, for breaking up and converting into tillage, between the 6th of January, 1818, and the first of January, 1825, seven acres of land, part of the premises comprised in the said indenture of lease, not being land excepted as in the said indenture of lease and declaration mentioned."

The arbitrator, on the 5th of July last, made and published his award—finding, "that the plaintiff had sustained damage and been injured to the amount of 10*l.*, by reason of the breach of covenant by the defendant in not manuring within one month after mowing, in the year 1832, part of the meadow lands comprised in the indenture of lease mentioned or referred to in the said amended account and particulars of the plaintiff's demand against the defendant, to wit, an indenture of lease of the 2nd of March, 1818." And the arbitrator further awarded, "that, in respect or on account of the several other causes, matters, and things specified in the said amended, further, and better account and particulars of the demand of the plaintiff against the defendant, and referred to him as aforesaid, the plaintiff had sustained no injury, and had not at the time of commencing his said action, or at any time afterwards, any cause of action against the defendant." And he further awarded that the defendant should pay the said 10*l.* to the plaintiff within one month; "and that, upon payment thereof, the plaintiff should, if required by, and at the cost of, the defendant, execute

case, the issues with respect to which the arbitrator has determined that the plaintiff had sustained no injury, and had not at the time of commencing his said action, or at any time afterwards, any cause of action against the defendant, have been virtually and substantially found for the defendant. The parties have agreed that the costs of the suit should abide the event of the award; and, though the cause was not strictly at issue, they have agreed that it shall be treated as a cause in which the issues are properly joined. If the cause were not at issue, the prothonotary could have had no power to tax the plaintiff's costs of the issue that has been found for him. The plaintiff cannot contend that the cause was ripe for judgment so as to entitle him to costs, and not so for all purposes. I therefore think the rule must be made absolute.

The rest of the court concurring—

Rule absolute (*a*).

(*a*) See Holder *v.* Raith, 4 N. & M. 466.

MUNKENBECK *v.* BUSHNELL.

Saturday, April 25th.

In debt on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of *debt* against J. S. On the production of the record (on a plea of nul tiel record), it appeared that the original action was *on promises.* The court allowed the declaration to be amended, on payment of costs, but required a special application for that purpose.

IN debt on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of *debt* by the plaintiff against one J. Lambert. The defendant pleaded nul tiel record. On the production of the record in *Munkenbeck* v. *Lambert,* the action appeared to be an action *on promises.*

Mr. Serjeant *Talfourd,* for the defendant, submitted that this was a fatal variance, and consequently that the defendant was entitled to judgment as upon a failure of the record. *Inces* v. *Hay,* Fort. 353, *Rowell* v. *Dyon,* Lutw. 945.

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MUNKENBECK v. BUSHNELL.

Mr. *Mansel*, contrà, prayed leave to amend the declaration. He cited *Engleheart* v. *Eyre*, 2 N. & M. 851, 5 B. & Ad. 68, where, on nul tiel record pleaded to debt on recognizance of bail, the postea shewn to the court proving erroneous in this respect, the court of King's Bench gave leave to amend it.

PER CURIAM.—The defendant is entitled to judgment for a failure of the record. The plaintiff, if he wishes to amend, must make a distinct application for that purpose. The fault here is higher up than in the case last cited.

Judgment for the defendant.

On a subsequent day, Mr. *Mansel* obtained a rule *nisi* to set aside the above judgment, and to amend, on payment of costs, upon an affidavit stating that the variance was occasioned by a mistake of the pleader. When the rule came on for argument, Mr. Serjeant *Talfourd* said, that, if the court were disposed to think it reasonable that the plaintiff should amend, he would not oppose it.

Amendment allowed.

other things, a certain close of land and a pond full of water in and upon the said close, situate in the parish of Islington, in the county of Middlesex; that, at the time of committing the grievance by the defendant thereinafter mentioned, the plaintiff was and still is under and by virtue of the said demise lawfully possessed of the said close of land, with the appurtenances, situate as aforesaid, and of the said pond full of water in and upon the said close; that the defendant, before and at the time of the committing the grievance thereinafter mentioned, was possessed of a certain close of land *used and employed by the defendant as a private road*, and adjoining the said close of land of the plaintiff and the said pond full of water in the said close: nevertheless, the defendant, contriving and intending to injure, prejudice, and aggrieve the plaintiff, and to deprive him of the use and benefit of the said pond full of water, whilst the plaintiff was so possessed of the said pond of water, to wit, on the 1st May, 1833, and on divers days and times between that time and the time of the commencement of the suit of the plaintiff against the defendant in that behalf, wrongfully and injuriously cut, dug, and made in his said close *used as a private road as aforesaid*, a certain large sewer close to and adjoining the said close and the said pond of water of the plaintiff, and kept and continued and caused to be kept and continued the said sewer adjoining to the said close and pond of water of the plaintiff for a long space of time, to wit, from thence hitherto, and thereby during all the time aforesaid wrongfully drew off and diverted large quantities of the water of the said pond; and the plaintiff thereby, for want of sufficient water in the said pond, could not during that time use, occupy, and enjoy his said close and his said pond full of water as he otherwise might, could, and would, and ought to have done: to the plaintiff's damage of 1000*l.*

The defendant pleaded not guilty.

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DUKES v. GOSTLING.

At the trial before Mr. Justice Park, at the Sittings in London, in Hilary Term last, the following facts appeared in evidence:—The plaintiff was tenant to the defendant of a field in the neighbourhood of Islington, in which was a pond used by the plaintiff for watering his cattle. The rent had originally been 40*l.* per annum. With the consent of the plaintiff (obtained by an abatement of 10*l.* of the rent), the defendant made a road across the pond; in the construction of which road, it was necessary to make a sewer to carry off the surplus water from the pond; and, in order to make the sewer, the pond was drained. To the improper construction of this sewer, the plaintiff attributed the want of water of which he complained: on the other hand, the defendant's witnesses ascribed it to an unusual drought. Upon the whole evidence, it appeared, that, although a cylinder had been erected at the mouth of the sewer, to prevent the water from running off by it until it had attained a depth of two feet and a half, yet that since the making of the sewer the plaintiff's pond had never been properly supplied with water. On the part of the defendant, it was contended that the grievance of which the plaintiff complained was misdescribed in the decla-

points; and left it to the jury to say whether or not the loss of water of which the plaintiff complained was consequent on the making of the sewer by the defendant. The jury found that it was, and returned a verdict for the plaintiff—damages 30*l.*

Mr. Serjeant *Spankie* having obtained a rule nisi to enter a nonsuit, on the grounds above stated—

Mr. *Byles* shewed cause.—The description of the defendant's close in the declaration, is necessarily its description at the time of the commencement of the action—Vin. Abr. "Declaration," (P.); and consequently there is no variance. In Sir *Nicholas Points'* case, Cro. Jac. 214, in an indictment for a forcible entry, it was laid, that, on such a day and year, the defendant entered into such land, existens liberum tenementum of J. B., and with force expelled him; and judgment was reversed, for not saying *ad tunc* existens; for, it might be the freehold of J. B. at the time of the indictment, and not at the time of the entry. So, in *Bridges's* case, Cro. Jac. 639, "Bridges and others were indicted pro eo quod they entered into such land, existens liberum tenementum of J. S., et manu forti disseised him: and because the indictment was not 'adhuc existens liberum tenementum,' and 'existens liberum tenementum' may refer to the time of the indictment, and not to the entry; therefore the indictment was adjudged to be ill." It is to be observed, that, at the time these cases were decided, the proceedings were carried on in latin. The participle preceding the verb, necessarily partakes of the tense of it: but it is otherwise where it follows the verb. In *The King* v. *Ward*, 2 Ld. Raym. 1461, it was held, that, in a criminal information, a participle applying to the person of the offender, in the same sentence with and preceding the charge, shall be referred to the time when the offence is stated to have been com-

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DUKES v. GOSTLING.

mitted, if it is not expressly referred to any particular time. And in *The King* v. *Somerton*, 7 B. & C. 463, an indictment charged that A. B. on a certain day, *being the servant of J. H.*, one gold ring then and there being in the possession of J. H., and being his goods and chattels, feloniously did steal: it was held that the fair import of the charge was, that A. B. was the servant of J. H. at the time when the theft was committed. Besides, that of which the plaintiff in this case complains is a continuing injury; and the description of it as a continuing injury in the declaration is correct.—At all events, if there be a variance, it is such a one as the judge might have amended at the trial, and as the court may order to be amended now under the statute 3 & 4 Will. 4, c. 42, ss. 23, 24. In *Hill* v. *Salt*, 2 Cr. & M. 420, where, in debt on bond, there was a variance between the penalty of the bond produced in evidence, and the penalty in the bond stated in the declaration, the latter being 260*l.* and the former being 200*l.*, it was held that the case was within the 3 & 4 Will. 4, c. 42, s. 23, and that the declaration might be amended. The description here of the use to which the defendant's close was applied was mere surplusage. By

tion of the house." Here, the matter excepted to is mere inducement, which, not being traversed by the defendant, is admitted to be correctly stated. If the cause went down again, and the defendant pleaded leave and license, on the evidence before the court, the plaintiff would have an answer; the defendant not having complied with the condition upon which the leave and license was granted.

Mr. Serjeant *Spankie*, and Mr. *Knowles*, in support of the rule.—The only fact alleged in the declaration that is admitted by the plea, is, that the plaintiff was tenant to the defendant. Then comes the gravamen of the charge, to which the defendant's denial extends—that the defendant wrongfully and injuriously cut, dug, and made *in his said close used as his private road* as aforesaid, a certain large sewer &c., and thereby drew off and diverted large quantities of the water of the plaintiff's pond. The defendant's admission of the inducement does not render it the less necessary for the plaintiff to prove the substantial part of the injury of which he complains. He could only plead generally that he was not guilty of the act as complained of. The plaintiff does not make out a case unless he shews that the defendant made the sewer in the place described in the declaration, viz. in the private road: and the evidence clearly negatived this. "In an action on the case for obstructing a right of way, such plea [not guilty] will operate as a denial of the obstruction only, and not of the plaintiff's right of way"—Reg. Hilary Term, 4 Will. 4, IV. There is nothing in the evidence to warrant the jury in finding that the supposed nuisance was a continuing nuisance.

Lord Chief Justice TINDAL.—In this case the defendant relies upon two objections that were made at the trial; the one, that the injury the plaintiff complains of is misdescribed in the declaration; the other, that there is a sub-

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stantial variance between the declaration and the evidence in another material point—the declaration alleging that the water was drawn off the plaintiff's pond by the sewer, whereas the evidence shewed that the drawing off the water preceded the making of the sewer. Looking at the record and at the evidence offered in support of it, I am of opinion that the defendant is answered on both points. One part of the declaration, by way of inducement, states, that, "before and at the time of the committing the grievance thereinafter mentioned, the defendant was possessed of a certain close of land, *used and employed by the defendant as a private road*, and adjoining the said close of land of the plaintiff and the said pond full of water in the said close." This gives rise to the first objection, viz. that it is a misdescription of the injury complained of, the road not being in existence and consequently not used by the defendant as a private road, as alleged, at the time of the grievance. The expression undoubtedly is equivocal: it might mean either, used at the time of the injury, or at the time of commencing the action. The ambiguity, however, might be cured by evidence. But, independently of that, is the allegation material? Does it in any degree relate to the gravamen of the action? What has it to do

fully and injuriously cut, dug, and made, in his said close used as a private road as aforesaid, a certain large sewer close to and adjoining the said close and the said pond of water of the plaintiff, and kept and continued, and caused to be kept and continued, the said sewer adjoining to the said close and pond of water of the plaintiff for a long space of time, to wit, from thence hitherto, and thereby during all the time aforesaid wrongfully drew off and diverted large quantities of the water of the said pond." On the part of the defendant it is contended that this statement is not borne out by the evidence; it appearing that the pond was emptied, not by the making of the sewer, but in order to enable the defendant to build it. The declaration, however, not only charges the defendant with having cut and made the sewer, but also with keeping and continuing it. And it appears from the evidence, that, by the wrongful act of the defendant, the plaintiff is still deprived of the enjoyment of his pond in so beneficial a manner as he ought to enjoy it. I therefore think the plaintiff is entitled to retain his verdict.

Mr. Justice GASELEE.—If it was necessary to deliver my opinion as to whether the words "used and employed by the defendant as a private road," applied to an user of the road at the time of the grievance complained of, or at the time of commencing the action, I should, as at present advised, say that they applied to the former. By the new rules, the defendant was clearly precluded from taking the objection. Upon that and the other grounds stated by the Lord Chief Justice, I think the verdict ought not to be disturbed.

Mr. Justice PARK gave no opinion, and Mr. Justice BOSANQUET was absent.

Rule discharged.

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Tuesday, April 28th.

In assumpsit by an attorney to recover his bill of costs for preparing a deed, and also costs of an action instituted in pursuance of that deed, in which action his client had failed in consequence of the deed having been held void on the ground of maintenance: —Held, that the defendant could not set up the illegality of the contract in answer to the action, under a plea of non assumpsit.

POTTS *v.* SPARROW.

ASSUMPSIT for work and labour as an attorney and solicitor of and for the defendant, and upon his retainer, and at his request, &c. Plea—non assumpsit. At the trial before Lord Chief Justice Tindal, at the Sittings at Westminster, after last Michaelmas Term, it appeared that the action was brought to recover the amount of the plaintiff's bill of costs for preparing, at the defendant's request, an agreement, dated the 7th August, 1830, and made between one Frances Stanley and the defendant, whereby the latter engaged to furnish the former with the means of enforcing a certain other agreement, dated the 9th September, 1824, and made between one John Jones and one Thomas Stanley, the father of Frances Stanley, whose administratrix she was; Frances Stanley covenanting to repay the defendant any expenses he might incur in the prosecution of the suit, as also a debt already due to him from her: and also for the costs incurred by the plaintiff in an action brought, at the request and on the retainer of the defendant, against John Jones at the suit of Frances Stanley, for the purpose of enforcing the agree-

. Serjeant *Talfourd*, in Hilary Term, obtained a rule :cordingly.

. *Comyn* shewed cause.—Admitting, for the purpose ument, that the contract in question was illegal, and ıble of being enforced (*a*), the rules of Hilary Term, l. 4, present an obstacle to the defendant's availing lf of the objection upon this record. He has simply ɜd non assumpsit: and the rule (Assumpsit, 1) pro- that, " in all actions of assumpsit, except on bills of nge and promissory notes, the plea of non assumpsit ɔperate only as a denial in fact of the express con- or promise alleged, or of the matters of fact from the contract or promise alleged may be implied by again (Assumpsit, 3), " In every species of assump- matters in confession and avoidance, including not hose by way of discharge, but those which shew the ction to be either void or voidable in point of law, : ground of fraud or otherwise, shall be specially ɜd; ex. gr., *illegality of consideration* either by e or common law," &c. [The court called upon—

ɜee Wallis v. The Duke of d, 3 Ves. 424, where Lord speaking of maintenance, 'The manner in which it is red at law is strongly illus- in Pierson v. Hughes, 1 71, 81, which was an action upon bond for money ex- and to be expended in the tion of that suit. Upon the ument it was held mainte- that giving the bond was as n evil as laying out money. rd, as amicus curiæ, stated, ı speak to a counsel or an y to encourage the suit ı he had no interest, had been adjudged to be maintenance. Upon the second day, the argument took this turn—that, as only a bond was given, no maintenance was in fact committed, upon the common maxim 'non officit conatus nisi sequatur effectus.' The answer of Vaughan was, 'that a bond given to maim or kill would be void, though the act never ensue.' Atkyns, Justice, was of opinion that a bond given while the suit was depending, for what was already expended, was maintenance; because an encouragement to go on with the suit."

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Mr. Serjeant *Talfourd* and Mr. *Dowling*, to support the rule.—The question here is, not whether the original agreement was illegal or not, but whether the plaintiff, who has in breach of the law conducted a suit as the attorney of a mere stranger, can recover in respect of work and labour so bestowed. The whole transaction was illegal from beginning to end; it was in fact an indictable offence: every step was a violation of the law. And this appears upon the plaintiff's own evidence. Can it be said, then, that the new rules deprive the court of the power of taking notice of this illegality? The rules must be intended to mean that the illegality of the consideration for the promise shall be pleaded specially, where such illegality constitutes an ingredient only in the subject matter of the suit; and not where the illegality of the contract so entirely pervades the whole transaction as to render it unfit to be entertained in a court of law.

Lord Chief Justice TINDAL.—The argument urged on the part of the defendant would apply with equal force to the case of usury. The offence of maintenance is no greater than that of usury: and I never heard, that, if a defendant neglected to set up usury as a defence, the

of the witnesses, is well founded. It may be that such an examination would be stopped.

The rest of the court concurring—

Rule discharged.

THE KING *v.* THE SHERIFF OF MIDDLESEX, in a Cause of BROADWOOD *v.* OGLE.

Thursday, April 30th.

The court ordered an attachment against the sheriff to stand as a security, where, had bail been duly put in and perfected, the plaintiff might have set down the cause for the sittings in the term, notwithstanding the accidental circumstance of there being at the time no place for the trial of causes in the Common Pleas in term.

MR. Serjeant *Talfourd* on a former day obtained a rule on the part of the bail in this case, calling upon the plaintiff to shew cause why an attachment that had been issued therein against the sheriff of Middlesex should not be set aside—the defendant having rendered.

Mr. *John Jervis*, for the plaintiff, submitted that he was at all events entitled to have the attachment to stand as a security, he having lost a trial within the meaning of the rule of Hilary Term, 2 Will. 4, s. V, by which it is ordered, "that, upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment or bail-bond shall stand as a security, if the plaintiff shall have declared de bene esse, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and, in a country cause, at the ensuing Assizes." It appeared from the affidavits that the defendant was arrested on the 23rd February, 1835; that an appearance was entered for him on the 3rd March; that a declaration de bene esse was filed and notice thereof given to the defendant, together with a rule to plead, on the 23rd March; that, on the 4th April, a judge's order was obtained for the sheriff to bring in the body of the defendant, which

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order was on the 15th made a rule of court; and that an attachment was obtained against the sheriff on the 23rd April, for not bringing in the body: so that, had bail been duly put in and perfected, the plaintiff might have set down his cause for trial at the Sitting in the present term, viz. the 5th May. The plaintiff had notice of the render of the defendant on the 24th April. *Jaques* v. *Campbell*, 1 D. & R. 450, was cited. There, on a question whether a regular attachment against the sheriff should stand as a security, the plaintiff having lost a trial, and it appearing that the cause, which was defended, might have been set down on the last Sitting in term, when defended causes are not usually tried; the court refused to take notice of the latter circumstance, and held that the plaintiff had lost a trial, and ordered the attachment to stand as a security.

Mr. Serjeant *Talfourd*, in support of his rule, submitted that the plaintiff could not be said to have lost a trial, inasmuch as there was only one day in the present term for sitting, and that for undefended causes only, and consequently the cause could not be tried within the term.

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Thursday, April 30th.

The court has no common law power to refer an attorney's bill for taxation.

An attorney's bill containing charges for searching for judgments, is not therefore taxable under the 2 Geo. 2, c. 23.

Ex parte Bowles's Trustees.

MR. *White* applied for a rule to refer to the prothonotary for taxation, under the 2 Geo. 2, c. 23, an attorney's bill for preparing a settlement and certain conveyances. The bill contained charges for searches and disbursements at the warrant of attorney office. This item, he contended, rendered the bill taxable; and he cited *Wilson* v. *Gutteridge*, 3 B. & C. 157, 4 D. & R. 736, where it was held that the court has authority to refer an attorney's bill for taxation, independently of the statutes 2 Geo. 2, c. 23, and 30 Geo. 2, c. 19; and an attorney's bill was referred to the master on the ground that one of the items was for drawing a warrant of attorney, which had never been executed: Lord Chief Justice Abbott saying, "Independently of the statute, the court still retains the power, and has constantly exercised the right, at common law, of directing the taxation of any attorney's bill. The plaintiff is an attorney of this court, and is as our officer under our control. We therefore have no hesitation in saying that his bill must be referred for taxation (*a*)."

Lord Chief Justice TINDAL.—In every case of conveyancing, there must be searches for judgments and incumbrances, and it seems to me that charges for such searches were not intended by the legislature to be included in the terms "fees, charges, and disbursements at law or in equity." *Wilson* v. *Gutteridge* has been expressly over-ruled on several occasions—see *Dagley* v. *Kentish*, 2 B. & Ad. 411, *Ex parte King*, 3 N. & M. 437, *Jones* v. *Roberts*, 2 D. P. C. 656. I cannot hold that the mere going to the warrant of attorney office, and there making

(*a*) And see Sandon v. Bourne, 4 Camp. 68, Weld v. Crawford, 2 Stark. 538, James v. Child, 2 Tyr. 732.

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searches, is a proceeding in a suit: consequently, I think we have no authority to interfere. If the demand be exorbitant, the party is not without remedy.

Mr. Justice BOSANQUET.—In *Fenton* v. *Correa*, 2 C. & P. 45, R. & M. 262, it was held that a charge for searching whether satisfaction of a judgment was entered, or whether an issue was entered, will not constitute an attorney's bill a taxable bill, so as to make it necessary to deliver it regularly signed before action brought.

The rest of the court concurring—

Rule refused.

Thursday, April 30th.

DICAS *v.* WARNE.

The court refused to allow the costs of a cause in another court, in which the plaintiff had been nonsuited, to be set off

MR. *Humfrey*, on a former day, on the part of the defendant's attorney, obtained a rule nisi that a sum of 48*l.* alleged to be due to him from the plaintiff, for the costs of an action brought by the plaintiff against one Gregory in the court of Exchequer, and in which action

Humfrey, in support of his rule.—The release was ›erly procured from Gregory for the purpose of ing his attorney of the means of obtaining the costs the plaintiff. There is therefore no reason why ›hould not be set off against a claim of the like : and degree of the plaintiff upon Gregory's attor-

d Chief Justice TINDAL.—In this case we are called :o allow costs claimed by the attorney for the defen- n a cause of *Dicas* v. *Gregory*, in the court of Ex- er, to be set off against costs that are the subject : of an attachment in this court. It is an applica- › our discretion. On the occasion out of which the lue from the present applicant to the plaintiff arose, ›urt took what seemed to me to be a very lenient ›f the case, and, instead of visiting the attorney with rier punishment for his irregular conduct, contented elves with ordering him to pay to the plaintiff in this all the costs of and occasioned by the application ·iking him off the roll (See 4 M. & Scott, 471). The : of the present application is, to procure to be set ainst the costs so ordered to be paid as a kind of :y, costs claimed to be due from the plaintiff to the ey in another cause, in another court. I think that, if it were more clearly made out than it is upon the vits, that the costs so claimed are due, it would be proper exercise of our discretion to allow this motion :vail. If the party is really entitled to the costs he ı, he is not without remedy.

e rest of the court concurring—

Rule discharged.

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Thursday, May 1st.

Where, in a country cause, costs are by a rule of court ordered to be paid "to the party or his attorney," a demand by the attorney in the country is sufficient to found a motion for an attachment for non-payment, although the agent in London is strictly the attorney on the record.

DENNETT *v.* PASS.

A RULE was obtained by Mr. *John Jervis*, on the part of the avowants, on a former day in this term, for an attachment against the plaintiff for non-payment of 99*l.*, being the amount of the prothonotary's allocatur for the costs of this cause, pursuant to a rule of court of Trinity Term last, whereby it was ordered "that the plaintiff do and shall pay to the defendants *or their attorney* their costs of and occasioned by the trial of this cause, together with their costs of and occasioned by this application to the court."

Mr. Serjeant *Atcherley*, on the 25th ult., on the part of the defendant, obtained a rule calling on the avowants to shew cause why the attachment should not be set aside, on the ground that Mr. Wagstaff, of Warrington, the avowants' attorney, by whom the costs were demanded upon the allocatur, was not the attorney upon the record, and therefore not the proper person to make the demand; the affidavit on which the motion was founded stating that

Mr. Serjeant *Atcherley*, in support of the rule.—The only party competent to make a demand is the attorney upon the record, who alone is capable of giving a good discharge. [Lord Chief Justice *Tindal*.—Would not a payment to Wagstaff be a good payment?] Payment to a managing clerk would be good; yet in *Hartley* v. *Barlow*, 1 Chit. R. 229, it was held that an attachment for contempt in not paying money to a party or his attorney, pursuant to the master's allocatur, could not be supported on an affidavit stating a demand of the money by the attorney's clerk. Where the demand cannot conveniently be made by the person mentioned in the rule or allocatur, the ordinary course is for him to execute a power of attorney.

Lord Chief Justice TINDAL.—It appears to me that the attorney in the country comes within the rule which authorizes a demand by the defendants or their attorney. The attorney who conducts the cause or defence is according to the ordinary understanding of the profession attorney for the party. The words of the rule generally are "attorney or agent." As between these parties, no doubt, Taylor was the town agent, and Wagstaff the attorney: and, indeed, in the affidavits to which our attention has been called, and which emanated from the plaintiff, Messrs. Finchett & Wagstaff are called the attornies of the defendants. With respect to the case cited, the distinction between it and the present is obvious: the managing clerk of the attorney may be changed at any moment; but the attorney in the cause cannot be changed without notice to the other party.

Mr. Justice PARK.—In *Ex parte Fortescue*, 2 D. P. C. 448, it was held, that, in order to bring a party into contempt for non-delivery of a bond pursuant to a rule of court, the demand of it must be made by one of the parties mentioned in the rule as entitled to receive it. When we speak of

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attorney and agent, it is understood that the agent is the person acting in town, the attorney in the country. It would be too much to say in this case that Mr. Taylor must go down to Warrington for the purpose of demanding these costs.

The rest of the court concurring—

Rule discharged (*a*).

(*a*) On a subsequent day in this term, in a case of Doe d. Chippen v. Roe, Mr. *Hayes* moved for an attachment for non-payment of costs that had been ordered to be paid *to the party*, on an affidavit of a demand made *by his attorney*. Mr. *Cancellor* stating, that, where costs are directed to be paid *to the party*, in order to found an attachment for non-payment, the demand must be made by him, or there must be a power of attorney—the motion was negatived.

Friday, May 1st.

To an action on a promissory note for 100*l.*

BOULTON *v.* COGHLAN.

THIS was an action of assumpsit upon a promissory note for 100*l.*, made by the defendant on the 12th December,

and playing at a certain game, to wit, a game called French Hazard, contrary to the statute in that case made and provided: and, the said sum having been so won and lost, and remaining due and unpaid, to wit, on the 12th December, 1833, it was agreed between the defendant and Aldridge that the payment thereof should be secured by the promissory note of the defendant to be by him made, and whereby he should promise to pay 100*l.* to the order of the said V. Knight, as for value received, six months after the date thereof: and the defendant averred, that, in pursuance of the said agreement, the defendant, to wit, on &c., made the said promissory note, and thereby promised to pay 100*l.* to the order of the said V. Knight, as for value received, six months after the date thereof, for securing the payment by the defendant of the said sum so won and lost as aforesaid; and the defendant further said that the said promissory note so made as aforesaid was and is the same identical promissory note in the declaration mentioned; whereby, and by force of the statute in such case made and provided, the said promissory note was and is void: and this &c.

Secondly—That there was not at any time any consideration or value for his the defendant's making the said promissory note or paying the amount of the said note or any part thereof; that the said V. Knight indorsed the said note to the plaintiff without any value or consideration for so doing; and that the plaintiff held the said note without any value or consideration for his having been or being the holder thereof.

Replication—That the said promissory note was not made by the defendant in pursuance of the agreement in the said first plea mentioned for securing the payment by the defendant of the said sum in that plea mentioned; that the said indorsement by the said V. Knight to the plaintiff was made before the said promissory note became due and payable, to wit, on the 6th February, 1834; and that the said V. Knight, then being the holder of the said promis-

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sory note, delivered the same to plaintiff with the said indorsement thereon, for a good and valuable consideration before and then given by the plaintiff to the said V. Knight for the same, that is to say, for and in respect of the said V. Knight being then indebted to the plaintiff in a large sum, to wit, 200*l.*, forthe work and labour of the plaintiff by him done and performed as an attorney and solicitor and otherwise for the said V. Knight, upon his retainer, and for money paid, laid out, and expended by the plaintiff for the said V. Knight, at his request.

The cause was tried before Mr. Justice Gaselee, at the Sittings in London after the last Michaelmas Term. The evidence offered on the part of the defendant in support of the first plea, was to the following effect:—The defendant's brother proved that on the 23rd July, 1833, the defendant and Aldridge settled an account between them of losses at hazard, when the former accepted and gave to the latter a *bill of exchange* for 87*l.*, dated on that day, and payable six months after date to the order of Aldridge, which he, Aldridge indorsed to Knight; that, on the 2nd December following, he was present at a conversation between the defendant and Aldridge, when it was admitted by

tiff to move to enter a verdict for 103*l.* 15*s.*, the amount of the note and interest, if the court should be of opinion that the evidence above mentioned was inadmissible, or insufficient to sustain the first plea.

Mr. *Steer*, accordingly, in Hilary Term last, obtained a rule nisi.—He submitted that the declarations not having been made at the very timeof the giving of the note, and it not appearing that Aldridge was any party to the note, or that the plaintiff was present at the conversations, the evidence ought not to have been received—the plaintiff having proved that he gave value for the note, and that he was ignorant of the illegality of the transaction out of which the note arose: and cited *Beauchamp* v. *Parry*, 1 B. & Ad. 89, where, in an action by the indorsee against the maker of a promissory note, declarations of the payee (not uttered at the time of making the note) were held not to be evidence to prove that the consideration for the note was money lost at play, unless it were previously shewn that the indorsee was identified in interest with the payee, as, by having taken the note after it was due, or without consideration.—He also contended that the issue tendered by the plea was not supported by the evidence if receivable.

Mr. Serjeant *Talfourd* and Mr. *Chandless* shewed cause. —The distinction between *Beauchamp* v. *Parry* and the present case, is, that there the declarations were made at the time the original note was given; whereas here they were made at the time of the substitution of the note for the bill. This case therefore falls within the principle of *Kent* v. *Lowen*, 1 Camp. 177, in which it was ruled by Lord Ellenborough, that, where, to an action at the suit of the indorsee against the maker of a note, the defence is usury in its original concoction, letters from the payee to the maker stating the consideration as between them, if shewn

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BOULTON v. COGHLAN.

to have been contemporaneous with the making of the note, are admissible evidence to prove the usury.—The original bill, having been given for an illegal consideration, was void, and the substituted note is equally so. In *Chapman* v. *Black*, 2 B. & A. 588, a bill of exchange affected by usury being in the hands of an innocent holder, the latter, on being informed of the usury, took a fresh bill in lieu of it, drawn by one of the parties to the original usury, and accepted by a third person for the accommodation of the other party: and it was held that he could not maintain an action against the acceptor of this substituted bill (*a*).

Mr. Serjeant *Spankie* and Mr. *Steer*, contra, were stopped by the court.

Lord Chief Justice TINDAL.—It is unnecessary to consider the first point urged in opposition to this rule, as we are all agreed, that, upon the first plea, evidence of the agreement between the defendant and Aldridge was inadmissible. The plea states, that, on the 23rd July, 1833, the defendant lost to Aldridge a certain sum at French Hazard, contrary to the statute; that, on the 12th December following, it was agreed between them that the pay-

the declaration. The replication states that the promissory note was not made by the defendant in pursuance of the agreement in the said first plea mentioned for securing the payment by the defendant of the sum in that plea mentioned. That appears to me to tender an issue as well upon the giving of the note as upon the fact of its having been given in pursuance of the agreement. It appears upon the evidence that the promissory note in the declaration mentioned was not given by the defendant to Aldridge in satisfaction of the money won by the latter as alleged in the plea; but that the security given upon that occasion was a bill of exchange for a different amount and having a different time to run; and that, before that bill became due, the promissory note was given in substitution of it. This appears to me be an agreement different from that set up by the plea. If this evidence were to be allowed, the position of the plaintiff would be materially prejudiced, as he would, upon a plea setting up one ground of defence, be called upon to contest two several and distinct agreements. Cases might be put in which the hardship on the plaintiff would be very great. Suppose, for instance, the first agreement had been for giving a bond, and the substituted agreement had been for a promissory note or a chattel; these would be perfectly new agreements, and such as the plaintiff could not be expected to come prepared to meet. I think, therefore, that, though in point of law the promissory note might be liable to the same objection as the bill of exchange for which it was substituted, yet the defendant could only avail himself of it as a ground of defence upon a plea stating the precise circumstances.

The rest of the court concurring—

Rule absolute (*b*).

(*b*) Mr. Serjeant *Talfourd* applied for leave to amend the plea, and go down to a new trial: but the court refused to allow it.

1835.

Monday, May 4th.

A party cannot be held to bail for arrears of a fee-farm rent issuing out of premises situate in Scotland.

M'KENZIE *v.* JOHNSON.

MR. *ADDISON* moved for leave to hold the defendant to bail for arrears of a fee-farm rent. The premises out of which the rent issued were situate in Scotland; and in the affidavit upon which the motion was founded the deponent stated that he was informed and believed that a party might be holden to bail in that country upon such a demand.

Lord Chief Justice TINDAL.—Even if the law of Scotland does allow of an arrest in such a case as this (which I very much doubt), I think it would not be allowable here. For an English fee-farm rent, it is clear that a party cannot be held to bail: and the general rule is that the lex loci regulates the mode of suing: the plaintiff must conform to the practice of the courts of the country in which he brings his suit. But, at all events, the present affidavit is insufficient. The law of Scotland upon the subject should be deposed to by some one conversant with it: a mere statement of the party's belief will not do.

[redacted]

corpus to the Fleet prison. The defendant afterwards applied to be discharged under the insolvent debtors' act; and, on his petition coming on to be heard, the commissioners decided that they had no authority under the statute (7 Geo. 4, c. 57,) to hear his petition, he being an infant, and consequently not able to execute a valid assignment of his estate and effects to the provisional assignee. Upon an affidavit of these facts—

Mr. Serjeant *Talfourd*, on a former day in this term, obtained a rule, on the part of the defendant, calling upon the plaintiff to shew cause why he should not be discharged out of custody.

Mr. *Hoggins* shewed cause.—The application is unprecedented and without authority. The 7 Geo. 4, c. 57, s. 49, provides, that, where it shall appear to the insolvent court that the prisoner is indebted for damages recovered in any action for libel or slander, or in any other action for malicious injury done to the plaintiff therein, when it shall appear to the satisfaction of the court that the injury complained of was malicious, it shall be lawful for the court to adjudge the prisoner to be discharged except as to such damages, and to imprison him at the suit of the plaintiff in such action for any period not exceeding two years, to be computed from the filing of the prisoner's petition. But this court has no power to discharge the defendant, nor any power to award the punishment which by that act the insolvent debtors' court are authorized to impose as a condition of the party's discharge.

Mr. Serjeant *Talfourd*, in support of his rule.—In *Ex parte Deacon*, 5 Barn. & Ald. 759, it was held, that, although a married woman who with her husband was in execution for a debt contracted by her before coverture, could not be discharged by the insolvent debtors' court,

1835.

DEFRIES v. DAVIS.

she not being capable of executing a warrant of attorney and complying with the other terms required by the insolvent debtors' act then in force, yet she might be discharged by the court in which the action was brought. The present motion was made in pursuance of what is there thrown out by the court. The application is undoubtedly addressed to the equitable discretion of the court; and the circumstances are such that the court must naturally feel anxious to assist the prisoner as far as their power extends, the objection being of so malicious and vindictive a nature, and the hardship so great upon the defendant, who will unless discharged by the court be detained in prison until he attains his majority. It was the plaintiff's fault that the insolvent debtors' court did not proceed to adjudicate upon the defendant's petition: he took an objection to their jurisdiction.

Lord Chief Justice TINDAL.—We should be extremely glad to interfere in favour of this defendant, if it could be shewn that we have any authority. But it seems to me that the case must be disposed of without any reference to the provisions of the 7 Geo. 4, c. 57. The general ques-

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DEFRIES v. DAVIS.

Mr. Justice PARK.—The courts will not always interfere even in the case of a feme coverte.

The rest of the court concurring—

Rule discharged.

GILLOW and Others, Executrix and Executors of G. GILLOW, deceased, *v.* SIR J. S. LILLIE

Thursday, May 7th.

A joint *and several* annuity granted by two persons, one of whom is an infant, though void as to the infant, by the statute 53 Geo. 3, c. 143, s. 8, is still good as against the other grantor.

COVENANT by the executrix and executors of the grantee, against one of two grantors of an annuity. The declaration stated, that, heretofore and before the decease of G. Gillow, to wit, on the 14th August, 1817, by a certain indenture then and there made between one Thomas Lillie of the first part, the defendant of the second part, the said G. Gillow of the third part, and one Hartley of the fourth part [profert], after reciting as therein is recited, it was witnessed, that, for certain pecuniary considerations to the said T. Lillie and the defendant respectively paid on the behalf and by the said G. Gillow, they the said T. Lillie and the defendant did, *and each of them* did give, grant, bargain, sell, and confirm unto G. Gillow, his executors, administrators, and assigns for and during the natural lives of M. M. Gillow, S. Gillow, and R. Gillow, in the said indenture mentioned, and the lives and life of the survivors and survivor of them, one annuity or clear yearly sum of 120*l.* of lawful money &c., to have, hold, &c. the said annuity or clear yearly sum of 120*l.* unto the said G. Gillow, his executors, administrators, and assigns for and during the natural lives of the said M. M. Gillow, &c., and the lives and life of the survivors and survivor of them, and to be paid and payable unto G. Gillow, his executors, administrators, and assigns at &c., by two half-yearly payments, &c., free and clear of and from all deductions and abatements whatsoever: and *the defendant*

1835.

GILLOW v. LILLIE.

did thereby, for himself, his heirs, executors, and administrators, *covenant*, promise, and declare with and to G. Gillow, his executors, administrators, and assigns, that they the said T. Lillie and the defendant, *or one of them*, their or one of their heirs, executors, or administrators, should and would well and truly pay or cause to be paid unto G. Gillow, his executors, administrators, and assigns, for and during the natural lives of the said M. M. Gillow, &c., and the lives and life of the survivors and survivor of them, the said annuity or clear yearly sum of 120*l.* &c., free and clear of and from all taxes and deductions whatsoever, at the days and times and in manner thereinbefore mentioned and appointed for payment of the same, according to the true intent and meaning of the said indenture; as in and by the said indenture, reference being thereunto had, will among other things more fully and at large appear; and although [averment of performance by G. Gillow and the plaintiffs respectively]; and although the said M. M. Gillow, S. Gillow, and R. Gillow were respectively living, yet, protesting &c.—breach—non-payment of the annuity for two years ending the 14th February, 1835.

Plea—that the said Thomas Lillie in the said indenture

covenant of one grantor of an annuity was not avoided by the infancy of another who granted by the same deed. [The court called on—

Mr. Serjeant *Merewether* to support the plea.—The covenant must be construed with reference to the intention of the parties. Now, the intention on the part of the defendant was, to pay, not alone, but jointly with another; and the law having interposed and declared the contract void as to the infant, the character of the deed is altogether changed, and the defendant may say non hâc in fœderâ veni. Besides, the procuring an infant to enter into such an engagement is by the law declared to be a misdemeanor; and the plaintiffs cannot come into court and enforce the performance of a contract the character of which the law has altered, which the act of parliament has declared to be illegal and void, and the procuring of which is an act of criminality in the very parties who seek to reap the benefit of it. This view of the case was not taken in *Han* v. *Ogle*.

Lord Chief Justice TINDAL.—If this had been the case of an annuity granted by the defendant and the infant jointly, I am not prepared to say that the consequence contended for on the part of the defendant would not have followed, viz. that the annuity would have been void as to both the grantors under the 8th section of the 53 Geo. 3, c. 143. But it is unnecessary to decide that point; for, this is a separate grant of an annuity by each party—" the said T. Lillie and the defendant did, *and each of them* did give, grant, &c.," and further, the defendant covenants, for himself, his heirs, &c., " that they the said T. Lillie and the defendant, *or one of them*," should pay, &c. There is no reason, therefore, for holding the grant by the defendant to be void. In the construction of deeds, the rule is, that, where the indenture is by any matter of law void as against

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GILLOW v. LILLIE.

one party, it is not necessarily void also as against others as to whom the particular disability does not apply.

Mr. Justice PARK.—I am of the same opinion. Even if the covenant had been joint only, and not joint and several, I doubt whether it would be void as to the present defendant. The case of *Motteaux* v. *St. Aubin*, 2 H. Bl. 1133, seems to me to be even stronger than the present. There, it was held that a joint warrant of attorney to confess judgment by an infant and another may be vacated against the infant only (*a*).

Mr. Justice GASELEE.—This defendant is not a mere surety. If the procurement of a grant of annuity from an infant were more than a misdemeanor, there might be ground for the argument.

Mr. Justice BOSANQUET.—This seems to me to be very like the case of a contract of apprenticeship, where the parent or other relative covenants for the acts of the apprentice; or of covenants entered into for the acts of a feme coverte.

Judgment for the plaintiff.

and indorsed by the defendant to the plaintiff. At the trial before Mr. Justice Gaselee at the Sittings at Guildhall in Hilary Term last, the course of the evidence was as follows:—The bill became due on Saturday, the 8th of June, 1833. One Lockwood, a clerk to a notary, stated that the bill was on that day left at his employer's office for presentment; that the course of business in the office was this—the clerk by whom the bill was presented, on his return entered in the margin of a book (which was produced) containing copies of the bills to be presented the answer given to him by the party to whom the presentment was made; that he knew a clerk in the office named Manning (now deceased); that the bill in question was given to Manning to present; that Manning went out for the purpose of presenting it; that he (the witness) was in the office when Manning returned; that the bill was entered in the book by another clerk, at the dictation of Manning; and that the entry in the margin, "no effects," was in the handwriting of Manning, and was made by him at the time. It further appeared that notice of the dishonor of the bill was given by the notary to the plaintiff on the Monday morning; that the plaintiff gave the like notice to the defendant by a letter which was put into the two-penny post on the Monday evening, and received by the defendant on Tuesday morning; and that all the parties were resident in London. On the part of the defendant, it was contended —first, that the entry by Manning, the clerk, was not the best evidence of the presentment—secondly, that the notice of the dishonor of the bill ought to have reached the defendant on the Monday. A verdict was taken for the plaintiff for the amount of the bill, leave being reserved to the defendant to move to set it aside, and enter a nonsuit, on the above grounds.

Mr. *Humfrey*, in Hilary Term, obtained a rule nisi accordingly.

1835.

POOLE v. DICAS.

Mr. Serjeant *Bompas* and Mr. *Hoggins* shewed cause.—The entry in question was clearly admissible; it was shewn to have been made by the deceased clerk in the regular and ordinary course of his duty, and at the time at which it purported to have been made: and notice of the dishonor of the bill was in due course transmitted to the defendant. *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 89, and the authorities there cited (to which may be added *Digby* v. *Steadman*, 1 Esp. 129, and *Fitchet* v. *Adams*, 2 Str. 1128), are conclusive. In *Doe* d. *Patteshall* v. *Turford*, where it appeared that it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; and on one occasion the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; and two of them were proved to have been delivered by him on that occasion: it was held, on the trial of an ejectment, after the attorney's death, that the indorsement so made by him

d. *Patteshall* v. *Turford*, is, "that an entry is to be received in two cases only—first, where it is an admission against the interest of a deceased party who makes it—and secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place." In that case, as in those there cited, the evidence received was the best and indeed the only evidence that could be given; whereas here the entry in question was like hearsay evidence; and it was offered, not for the purpose of proving the presentment of the bill only, but also to prove the answer given on such presentment. The case falls within the principle of *Chambers* v. *Bernasconi*, 1 Tyr. 335, 1 C. & J. 451. There, in order to establish an act of bankruptcy by an absenting at Paddington, the officer who arrested the plaintiff on the 9th November being dead, his follower swore that the arrest took place at Paddington. The plaintiff, in order to establish the arrest to have been in South Molton Street, offered in evidence, from the files of the office of the undersheriff of Middlesex, a paper writing or certificate annexed to the writ of the 9th November, purporting to be signed by the deceased officer, and addressed to the undersheriff of Middlesex, as follows:—"9th November 1825. I arrested Abraham Henry Chambers, the elder, in South Molton Street, at the suit of William Brereton—signed, Thomas Wright." The acting undersheriff for Middlesex proved, that, though it was sufficient for the sheriff's return, that the arrest was within his jurisdiction, except in cases of rescue, where the place of rescue was stated in the return (see Tidd's Appendix to the 9th ed. of The Practice, p. 109), yet that, by the course of the office, the officer was required, immediately after the arrest, and before taking a bail-bond, to transmit to the sheriff's office a memorandum or certificate of the arrest; and that for the last few years an account of the place where the arrest took place had been also required from them. The

not know where to stop. Keeping in view, the
to which the doctrine contended for would
of opinion that this document was not adm
dence at all." [Lord Chief Justice *Tindal*.- V
bers v. *Bernasconi* afterwards came before th
ror (4 Tyr. 531), the ground upon which it w
the evidence offered was inadmissible, was, t
no part of the duty of the officer to state the
tion, such statement was the act of a mere vol

Then, the notice of the dishonor of the bill
late. The parties being all resident in Lon
bill being in the hands of the indorsee, a
banker, the notice ought to have reached th
hands on the Monday. In *Smith* v. *Mullet*, 2
in an action by the fourth against the first i
bill of exchange, all the parties to which resi
don, it appeared that the plaintiff received i
dishonor of the bill from his indorsee on th
month, and gave notice to his immediate indo
ter put into the two-penny post-office on th
the 21st, but so late that it was not delivered
morning of the 22nd: it was held that by th
plaintiff discharged all the prior indorsees, alt
course of the 22nd notice of the dishonor wa

Lord Chief Justice TINDAL.—It appears to me, upon inspecting the bill, that there is no ground for the last objection. The bill would in the ordinary course be returned to the holder on the Monday, and consequently the notice to the defendant on Tuesday, by a letter put into the post-office in the course of Monday, was in time.

Upon the other point, it appears to me that the evidence was admissible. I hold it to be admissible because it was an entry made in the usual course and routine of the duty of the deceased clerk who made it, and made at the time it purports to have been made. If there were any doubt as to this latter point, undoubtedly the cause ought to go down again. It appears to me, that, upon the evidence as reported to us, we must assume that it was a contemporaneous act: had the fact been doubtful, it might have been easily ascertained on the cross-examination. It seems to me, therefore, that, in holding this evidence to be admissible, we shall not be carrying the law further than it is laid down in the case of *Doe* d. *Patteshall* v. *Turford*. There, it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; and on one occasion the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his

between nine and ten in the evening by a notary: on Monday the bankers informed the holder that the bill was dishonored, who on Tuesday about noon gave notice to the indorser: the holder lived at Knightsbridge, and the indorser in Tottenham Court Road: it was held that this notice was sufficient to enable the holder to recover against the indorser. And see Bray v. Hadwen, 5 M. & Sel. 68, Darbyshire v. Parker, 6 East, 3, 1 Smith, 195, Hilton v. Shepherd, 6 East, 14, n., Scott v. Lifford, 9 East, 347, 1 Camp. 246, Jameson v. Swinton, 2 Taunt. 224, 2 Camp. 373, Marsh v. Maxwell, 2 Camp. 210, n., Lindo v. Unsworth, 2 Camp. 602, Hilton v. Fairclough, 2 Camp. 633, Williams v. Smith, 2 B. & A. 496, Hawkes v. Salter, 1 M. & P. 750, 4 Bing. 715, Grill v. Jeremy, M. & M. 61.

capable of being rebutted by contrary testin
present occasion, Manning, the clerk, had a
perform, viz. to present for payment in the e
left at the office during the day, and on his r
an entry in a particular book of the answer
party to whom the presentment had been
the first observation that arises, is, that t
made in the course of the clerk's duty; and
had not the most remote interest in making
Besides which he would find much less tro
culty in making the entry in accordance with
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but also incur disgrace and probable dismiss
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and consequently an erroneous entry would
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are other circumstances strongly tending to
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him of the dishonour of the bill, is a link i
circumstances one would naturally look for
were properly made. It is said that *Doe* d
Turford can only be supported on the groun

case, the hardship would be equally great, if the plaintiff were compelled to call the party who gave the answer to the clerk. This would involve the plaintiff in a difficulty and expense which the necessity of the case by no means warrants. Unless the evidence in question were held admissible, the security of bills of exchange would be very much impaired: it would follow that the death of a clerk would place in doubt and uncertainty all outstanding bills or notes that had been presented by him.

Mr. Justice PARK.—I am of the same opinion. Were we to decide the contrary, we should be bringing in question the authorities that have been cited, and should occasion much mischief and alarm in the commercial world. I fully agree with the opinion of Mr. Justice J. Parke in *Doe* d. *Patteshall* v. *Turford*. That learned judge puts that case precisely upon the same ground upon which my Lord Chief Justice puts the present. He says: "The only question in this case is, whether the entry made by Mr. Patteshall was admissible in evidence; and I think it was, not on the ground that it was an entry against his own interest, but because the fact that such an entry was made at the time of his return from his journey, was one of the chain of facts (there are many others) from which the delivery of the notice to quit might lawfully be inferred. That delivery might be proved by direct evidence, as, by the testimony of the person who made it, or saw it made; it might be proved also by circumstantial evidence, as many facts ordinarily are which are of much greater importance to the interests of mankind, and followed by much more serious consequences. In this point of view, it is not the matter contained in the written entry simply which is admissible, but the fact that an entry containing such matter was made at the time it purports to bear date, and when in the ordinary course of business such an entry would be made if the principal fact to be proved had really taken

that about twenty bills were in the same m
and the answers in like manner recorded.
though admissible is not conclusive: it n
With respect to the case of *Chambers* v.
answer to that was given in the course
the officer exceeded his duty in naming th
in the indorsement; such entry therefore
of that fact. I have always (and I speak
of more than forty years) understood the
down in *Doe* d. *Patteshall* v. *Turford.*

Mr. Justice GASELEE.—I am of the sam
case falls within the principle laid down
shall v. *Turford.*

Ru

Saturday, May 9th.

A motion for a commission to examine witnesses upon an issue out of Chancery, is properly made to the court in which the trial is to be had.

BORDIEU and Others *v.* ROWE and

MR. Serjeant *Spankie* obtained a rule
mission for the examination of a witnes
under the statute 1 Will. 4, c. 22, s. 4,
affidavit.

Mr. *W. H. Watson* shewed cause.—Th
out of Chancery, he submitted that it cou

1835.

BORDIEU v. ROWE.

Lord Chief Justice TINDAL.—I am of opinion, that any ›roceeding having reference to the trial is the proper subect of an application to the court in which the trial is to ›e had. An application to postpone the trial until the ›ersonal attendance of the proposed witness could be ›rocured (which was one of the difficulties and delays ıtended by the act to be remedied), would at all events ›e made to us. For the purpose of this motion, I think n issue out of Chancery is a cause depending in the ourt in which it is to be tried, within the meaning of this tatute.

The rest of the court concurring—

Rule absolute (*a*).

(*a*) The statute does not apply to indictments—Rex v. Briscoe, 1 D. P. C. 520.

ARAYNE *v.* LLOYD and Others.

Saturday, May 9th.

The court discharged with costs a rule under the interpleader act obtained after an injunction granted by the court of Chancery for restraining the execution.

A RULE had on a former day been obtained by Mr. *Colquhon*, on the part of the sheriff, for the usual relief ınder the interpleader act.

Mr. Serjeant *Atcherley*, for the execution creditor, subıitted, on the authority of *Sturgess* v. *Claude*, 1 D. P. C. 05, that the motion could not be entertained, it appearing ıat an injunction had on the 16th April (the day on hich the present rule was moved for) been granted by ıe court of Chancery, on the motion of the assignees, for ›straining the execution, of which motion the sheriff ust, according to the practice, have had notice four ıys before he came to this court.

Mr. *Wightman* appeared for the assignees.

PER CURIAM.—Under the circumstances, this applica›n was improper.

Rule discharged, with costs.

1835.

Tuesday, May 5th.

By the terms of an order of reference, the arbitrator was, amongst other things, to determine whether a certain agreement had been entered into between B. and W. upon some and what representations, and whether the same were unfounded, and to award compensation to the party injured thereby, if he should think fit; to decide the terms upon which the agreement was to be cancelled; and also which of the parties had a right to receive bills of costs for business done

BURTON *v.* WIGMORE.

THE declaration stated, that, an action having been brought by Burton against Wigmore, and another by Wigmore against Burton, it was, by a judge's order made in the two actions, by consent of the parties, ordered that the said two causes should be referred to the award of an arbitrator, who was to determine whether a certain agreement in writing, dated the 23rd August, 1831, and a certain assignment of a lease, dated the 5th of October, 1831, one or both, was or were not entered into and executed by the said parties upon some and what representations, and whether the same were unfounded, and to award compensation to the party injured thereby, if the arbitrator should think fit; to decide whether the said parties or either and which of them had violated or committed breaches of the said agreement, and in what particular, and to award compensation if he should think fit for such breach or breaches; to decide the terms upon which the said agreement was to be cancelled; and also which of the said parties had a right to receive bills of costs for business done for the connection

sum paid by Burton as a consideration for the said lease and fixtures and moneys laid out in repairs, and without prejudice to Burton's interest in the said lease: That the arbitrator, after hearing the parties, awarded—first, that the said actions in the order mentioned should be discontinued by the plaintiffs therein; and found, first, that the said agreement in the order of reference mentioned was entered into upon certain representations, in substance, that the business of an attorney then carried on by Wigmore netted an average profit of between 1000*l.* and 1500*l.* a year, that it was a very respectable business, that the house in which it was carried on was in a thorough state of repair, that Wigmore would entirely withdraw himself from practice in London or within seven miles of it, and that he would use his best endeavours effectually to transfer the said business to Burton—next, that the extent and character of the said business and the state of repair of the said house had not been truly represented, and that the two last of the said representations were introduced as stipulations in the agreement, and were not performed by Wigmore: but the arbitrator awarded to Burton no specific compensation for such misrepresentations or breaches, having taken the same into account on the final settlement thereinafter directed between the parties: That the arbitrator further found, that Burton was entitled to receive the bills of costs for all business done for the connection of Wigmore from the 5th October, 1831, to the 6th November, 1832; that during that period Wigmore had improperly received in respect thereof the sum of 40*l.* 15*s.*, and properly, in part payment of certain furniture sold by him to Burton, the sum of 82*l.* 16*s.* 3*d.*; that Burton had received properly during the same period the sum of 288*l.* 13*s.* 3*d.*; and that there would be due to Wigmore in respect of the total receipts, after deducting the disbursements and allowances referred to in the said agreement, the sum of 110*l.*: but the arbitrator by his award

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directed that no payment was to be made specifically in respect thereof, as he had taken the same into account in the final settlement thereinafter directed between the parties: and, lastly, that the arbitrator, having considered on the one hand the several claims made by Wigmore, and on the other the claims of Burton, by his award directed that the said agreement should be cancelled, and that the several claims of the parties should be settled on the following terms, viz. that Burton should retain the dwelling-house in the agreement mentioned, and certain goods and chattels in the award specified; that all payments and receipts of money on either side made up to the 6th November aforesaid, should stand good; that Burton should be at liberty to collect and retain on his own account all sums of money due for business transacted at the office in E. Street from the 5th October, 1831, to the 6th November aforesaid, *and to use the name of Wigmore, either alone or jointly with his own, if necessary, in suing for the same;* that Wigmore should, upon the 1st October then next ensuing, pay the sum of 100*l.* to Burton as damages, and should also execute a release of all actions, claims, and demands whatsoever, except as there excepted; that Bur-

[redacted]

time before or since, although duly requested, pay or cause to be paid to the plaintiff the said sum of 100*l.* or any part thereof. Demurrer and joinder.

Mr. *Miller*, in support of the demurrer.—The arbitrator has exceeded the authority given to him by the order of reference, in directing that Burton should use the name of Wigmore in suing for the bills of costs for business done for Wigmore's connection from the 5th October, 1831, to the 6th November, 1832; and therefore the award is void. If such power were vested in the arbitrator, the consequence would be, that actions without number might be brought by Burton, and Wigmore might be liable, in the event of any of them proving unsuccessful, to judgment and execution for the costs. Some provision should at all events have been made to guard Wigmore against this contingency. Besides, this power to Burton to sue in the name of Wigmore precludes a final settlement between the parties, which it was the sole object of the reference to effect. It does not appear who is to pay the costs of the suits so instituted. [Lord Chief Justice *Tindal*.—Why are we to assume that the actions brought by Burton will fail, *and* that, if he do fail, he will neglect to pay the costs, as he is in duty bound to do?] The primary object of the parties was, to put an end to the litigation between them: this the award in its present form has not done.

Lord Chief Justice TINDAL.—The question is, whether, in directing that Burton shall be at liberty to use the name of Wigmore in suing for bills of costs due to the firm, the arbitrator has exceeded the authority given him by the order of the court: for, if he has so done, it is in so material a point that we must hold the award to be altogether void. I am of opinion that the arbitrator has not exceeded his authority. It appears that disputes had arisen between the parties; and that the arbitrator was,

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amongst other matters, to decide the terms upon which the agreement mentioned in the order of reference should be cancelled, and also to decide which of the parties had a right to receive bills of costs for business done for the connection of Wigmore since the 5th October, 1831. The arbitrator having found that Burton was the person entitled to receive the outstanding bills, I think he has not exceeded his authority in awarding that Burton shall be entitled to sue for them in the name of Wigmore. Without such power he would be a mere cypher. I should have been of this opinion if the arbitrator had only been directed to decide which of the parties should collect the debts; but the authority to decide *the terms* on which the agreement between them should be cancelled, gives him much larger powers, and materially strengthens the case. It is said that the award is not final, inasmuch as in the event of actions being brought by Burton in Wigmore's name terminating unsuccessfully, and the costs being unsatisfied by Burton, Wigmore may be called upon to pay them. But, as far as regards the disputes existing and then before the arbitrator, the aware is conclusive. It is possible, indeed, that disputes might hereafter arise

decide the terms upon which the agreement of the 23rd August, 1831, should be cancelled. He has done so; and one of the terms he has thought fit to impose, is, that Burton should be at liberty to use the name of Wigmore in suing for the partnership debts. I think in so doing he has not exceeded his authority; and that the award is good.

Mr. Justice VAUGHAN.—The authority, as it appears to me, is explicit and clear, and it has been explicitly and clearly adjudicated upon. How could Burton receive the debts unless he had power to bring actions? and how could he sue, but in the name of the firm?

Mr. Justice BOSANQUET.—By the terms of the order, the arbitrator was, amongst other things, to determine whether a certain agreement had been entered into upon some and what representations, and whether the same were unfounded, and to award compensation to the party injured thereby, if he should think fit; to decide the terms upon which the agreement was to be cancelled; and also which of the parties had a right to receive bills of costs for business done for the connection of Wigmore since a given day. The arbitrator found that there had been misrepresentations on the part of Wigmore; but he awarded to Burton no specific compensation for such misrepresentations, having taken the same into account on the final settlement directed between the parties. He also found that Burton was entitled to receive the bills of costs above mentioned; and directed that Burton should be at liberty to collect the same, and to use the name of Wigmore, either alone or jointly with his own, if necessary, in suing for the same. This, it is objected, may subject Wigmore to liabilities for the costs of any actions that may be brought in his name. But that liability seems to have been taken into account by the arbitrator in directing the final settlement between the parties.

Judgment for the plaintiff.

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Friday, May 8th.

Trover lies at the suit of the assignee of an insolvent debtor against an execution creditor for a sale after the commencement of the insolvent's imprisonment of goods seized before under a fi. fa. issued upon a warrant of attorney—7 Geo. 4, c. 57, s. 34.

KELCEY, Assignee of FORDRED, an Insolvent Debtor, v. MINTER and Another.

TROVER for goods, by the plaintiff as assignee of William Fordred, an insolvent debtor.

Third plea—That before Fordred subscribed his petition, to wit, in or as of Michaelmas Term, 3 Will. 4, in the court of our said lord the king before the king himself, the defendants by the consideration and judgment of the same court recovered against Fordred a certain debt of 600*l.*, and also 65*s.* costs, which in and by the same court were adjudged to them, with their assent, for the damages which they had sustained as well by occasion of the detaining of the said debt as for their costs and charges by them about their suit in that behalf expended, whereof the said Fordred was convicted—prout patet &c.; that, the said judgment being in full force, and the said debt and damages being wholly unpaid, the defendants, for the obtaining satisfaction thereof, afterwards and before Fordred subscribed his petition, to wit, on &c. aforesaid, sued and prosecuted out of the said court of our said lord the king before the king himself a certain writ of our said lord the king

fees, and all other incidental expenses; and which said writ afterwards and before the return thereof, and before the said Fordred subscribed his said petition, to wit on &c., was delivered to one D. G. James, Esq., then being sheriff of the said county, to be executed; by virtue of which writ the said D. G. James, so being such sheriff as aforesaid, afterwards and before Fordred so subscribed his said petition, to wit, on the day and year last aforesaid, seized and took the goods and chattels in the declaration mentioned for the purpose of levying the monies by the indorsement directed to be levied; which seizure and taking under the said writ were the same conversion and disposition as in the declaration mentioned; and this &c.

Replication.

Replication—That, before the said judgment in the plea mentioned was recovered against Fordred by the defendants, to wit, on the 9th January, 1833, Fordred executed a certain warrant of attorney directed and addressed to one J. B. and one H. W., described as two of the attornies of his majesty's court of King's Bench at Westminster jointly and severally, or to any other attorney of the same court; and thereby, amongst other things, directed and authorized them, the attornies therein named, or any one of them, or any other attorney of the same court of King's Bench aforesaid, to appear for him Fordred in the said court, as of Michaelmas Term then last, Hilary Term then next, or any other subsequent term, and then to receive a declaration for him in an action of debt for 600*l.* for money borrowed, at the suit of John Minter and Richard Hobday, the defendants in the present suit; and thereupon to confess the same action, or else to suffer a judgment by nil dicit or otherwise to pass against him in the same action, and to be thereupon forthwith entered up against him of record of the said court for the said sum of 600*l.*, besides costs of suit—as by the said warrant of attorney, remaining of record in the said court of our said lord the king before the king himself, reference being thereunto had,

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would amongst other things more fully appear; that the said judgment in the plea mentioned was afterwards, to wit, on &c., obtained upon the said warrant of attorney, and the said writ in the said plea mentioned was issued upon the said judgment so obtained as aforesaid; that the imprisonment of Fordred, from which he was so discharged as in the declaration mentioned, commenced on the 8th February, 1833; and that the goods and chattels in the declaration mentioned, which had theretofore been so seized and taken as in the plea mentioned, were sold under the said writ so issued and judgment so obtained as aforesaid, after the commencement of the imprisonment of Fordred as aforesaid, contrary to the true intent, meaning, and provisions of the statute in that case made and provided; and this &c.

Rejoinder.

Rejoinder—That, before and at the time of the executing of the said warant of attorney, Fordred was indebted to the defendants in a large sum of money, exceeding the sum for which the said warrant of attorney was so given and for which the said execution so issued as aforesaid, and exceeding the value of the said goods, chattels, and effects, to wit, the sum of 600*l.*; that the said Fordred being so indebted as aforesaid, the defendants required the said

to the defendants, and still was in arrear and unpaid to the defendants; and this &c.

Demurrer and joinder.

Mr. *Bayley*, in support of the demurrer.—The rejoinder is no answer to the replication—it admits that the sale of the goods took place after the commencement of the imprisonment of Fordred: and all the allegations therein, which, according to the dictum of Lord Mansfield in *Coppendale* v. *Bridgen*, 2 Burr. 818, might have afforded a defence to the action before the passing of the 7 Geo. 4, c. 57, now only tend to an immaterial issue. The 34th section of that statute enacts, "that, in all cases where any prisoner who shall petition the court for relief under this act shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or cognovit actionem, shall and may be a creditor or creditors for the same under this act." Here, it stands uncontroverted upon the record, that the warrant of attorney was given on the 9th January, 1833, that the goods were seized on the 23rd, that the imprisonment of the insolvent commenced on the 8th February, and that the sale of the goods took place after the commencement of such imprisonment.

Mr. *James Manning*, contrà.—The only conversion

not having been at that time rendered to pri
Chief Justice *Tindal.*—The sheriff sold, and
nary course, as we must presume, paid over tl
to the execution creditors.] It was the sher
pay over the proceeds to the assignee; and th
not presume that he has done other than h
never was suggested in *Notley* v. *Buck* that t
lie against the execution creditor unless he in
directed the sheriff to sell, after notice that
had committed an act of bankruptcy.

Lord Chief Justice TINDAL.—This case see
be brought within the meaning of the clause o
which has been cited. It appears upon the
the sale of the goods in question took plac
commencement of the insolvent's imprisonme
execution issued upon a security given before.
v. *Buck*, there was an express averment in the
that the sheriff had notice of the act of bankr
he proceeded to a sale: he was therefore clea
doer. It is true, that nothing is said in th
the liability of the execution creditor to a
was not necessary; the court were only deali
sheriff. But, upon general principles, I hold i
that where one puts another in motion th

'. Justice PARK.—*Notley* v. *Buck* turned expressly e fact of notice. The sheriff there sold the goods, aid over the proceeds to the execution creditor after ad received notice that the debtor had committed an bankruptcy. Here, the defendants were bound to nt the sale.

'. Justice GASELEE.—The defendants set the law in n by issuing the writ and delivering it to the sheriff ie might make the debt. They should have given iotice not to proceed to sell.

Judgment for the plaintiff.

BARNETT v. GLOSSOP.

Friday, May 1st.

In assumpsit for money agreed to be paid by the defendant for a dramatic piece composed by the plaintiff, and the sole right of acting and representing the same bargained and sold by the plaintiff to the defendant, and for money due upon an account stated—the defendant cannot set up the want of an assignment in writing as a defence to the action, unless it be specially pleaded.

SUMPSIT. The declaration stated that the de- nt was indebted to the plaintiff in 50*l.* for money d to be paid by the defendant to the plaintiff certain dramatic piece written and composed by plaintiff, and the sole right of acting, performing, representing the same, bargained and sold by the tiff to the defendant at his request; and in 50*l.* for y found to be due from the defendant to the plaintiff i account stated between them: and the defendant wards, to wit, on &c., in consideration of the premises ctively, promised the plaintiff to pay him the said al monies respectively on request; yet, &c.

ea—that the defendant did not promise in manner orm as the plaintiff had in his declaration alleged, &c. the trial before the sheriff of Middlesex, it appeared he plaintiff sought to recover a sum of 15*l.* agreed to id to him for the copyright and sole right of acting matic piece called "Victorine." The substance of vidence was, that the piece in question had been ac-

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cepted by the defendant, the lessee of the Victoria Theatre, and announced by him for rehearsal; and that, in a conversation upon the subject with one Phillips, a mutual friend of the parties, the defendant had said, "I saw Barnett last night, and I agreed to give him 15*l.*" On the part of the defendant it was objected that there was no proof of an assignment of the copyright to satisfy the statute 8 Anne, c. 19, s. 1; nor of any license to the defendant under the 3 & 4 Will. 4, c. 15, s. 15. For the plaintiff it was submitted that such an objection could only be taken upon a special plea, under the rules of Hilary Term, 4 Will. 4. The undersheriff thinking the objection inadmissible as the record stood, directed the jury accordingly. A verdict having been found for the plaintiff, damages 15*l.*—

Mr. *Thomas* obtained a rule nisi to set aside the verdict and enter a nonsuit, or for a new trial.

Mr. *Dowling* shewed cause.—The defence attempted to be set up ought to have been pleaded specially. By the rule of Hilary Term, 4 Will. 4, Assumpsit, 3, it is declared, that, "in every species of assumpsit, all matters in

[Mr. Justice *Bosanquet.*—Is it denied that there is a good cause of action at common law?] There can be no copyright except by statute. [*Dowling* cited *Miller* v. *Taylor*, 4 Burr. 2303, where ten of the judges held that an author had a copyright at common law.] The evidence tendered was properly receivable under this plea: there was no illegality of consideration: the plaintiff had only failed to comply with certain formalities required by law. [Mr. Justice *Bosanquet.*—The general issue is abolished, save where it is given by statute—see the 3 & 4 Will. 4, c. 42, s. 1.] The statute of Anne here gives the general issue. [Lord Chief Justice *Tindal.*—That means only where it is pleaded as a defence in an action for anything done under the act.] In the case of an action by an apothecary, the plaintiff must be nonsuited unless he prove that he was duly authorised to practise as an apothecary—so, in the case of an action by an attorney, he cannot recover unless he prove the delivery of a signed bill a month before the commencement of the action, under the statute 2 Geo. 2, c. 23 (*a*). [Lord Chief Justice *Tindal.*—Was there not sufficient evidence to support the count upon an account stated?] The objection would equally apply to that; the action is not maintainable at all without proof of an assignment in writing.

Lord Chief Justice TINDAL.—Upon the best interpretation I can put on the new rules, it seems to me that the answer now attempted to be set up to the plaintiff's claim should have been put upon the record. The words of the rule applicable to the present case are—" In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as *a denial in fact* of the express contract or promise alleged,

(*a*) See the case of Beck v. Mordaunt, post Vol. 2, Trinity Term, 5 Will. 4, and The New Rules of Pleading, by Bosanquet, p. 51, n. (49).

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or of the matters of fact from which the contract or promise alleged may be implied by law. The declaration states that the defendant was indebted to the plaintiff for money agreed to be paid by the defendant to the plaintiff for a certain dramatic piece written and composed by the plaintiff, and the sole right of acting, performing, and representing the same, bargained and sold by the plaintiff to the defendant at his request. The answer attempted to be given on non assumpsit, is, that the inference to be drawn from the statutes 8 Anne, c. 19, and 3 & 4 Will. 4, c. 15, is, that there can be no valid sale of dramatic property unless by a contract in writing. It appears to me that this is no "denial in fact of the express contract or promise alleged" in the declaration, as required by the rule; but an attempt on the part of the defendant to avail himself of an objection in point of law to the contract, of which the 3rd rule under the same head is an exemplification—"All matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded:" and amongst the examples given by the rule

ges in the framing of these rules I understand to have n, that plaintiffs should not be taken by surprise, and e into court in ignorance of the nature of the defence nded to be set up. If this defence had been placed n the record, no judge would have permitted the cause e tried before a sheriff's jury.

Mr. Justice GASELEE.—I am also of opinion that the ence here set up was properly the subject of a special . The cases cited have no application to this point ept in so far as they tend to shew that a verbal contract the transfer of literary property gives the transferee right of action for an infringement, and consequently s not constitute a legal consideration. But, by the new s, illegality of consideration is required to be specially ded.

Mr. Justice BOSANQUET.—I am of the same opinion; and ust confess I should much regret it if we felt ourselves nd to arrive at a different conclusion. The great ob- of the new rules was, to cause all legal defences to be upon the record: the only exception is where the ge- l issue is expressly given by statute; in all other cases general issue has ceased to exist, and (in actions of as- psit) the plea of non assumpsit, which is confined to a ial in fact of the contract or promise stated in the de- ation, is substituted. It is not suggested in the pre- case that a good cause of action at common law does appear upon the face of the declaration: but it is said, , the requisites of the statutes not having been ob- ed, the promise is void. The case therefore clearly within the rule: the cause of action, though good at mon law, is rendered unavailable by statute; but, in r to let in the objection, it should have been placed n the record.

Rule discharged.

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Saturday, May 2nd.

In assumpsit for work and labour, the defendant pleaded, that by agreement between the parties the sum demanded was to be paid to the plaintiff upon his completing the work to the satisfaction of the defendant, *or* his surveyor, and that the work was not completed to the satisfaction of the plaintiff *or* his surveyor. The plaintiff replied that the work was finished to the satisfaction of the defendant *and* his surveyor, without this that it was not finished to the satisfaction

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ASSUMPSIT for work and labour and materials, goods bargained and sold, &c. Plea, that, by agreement between the plaintiff and defendant, the sum demanded was to be paid by the defendant to the plaintiff upon the latter completing a certain building to the satisfaction of the defendant *or* to the satisfaction of his surveyor, and that the building had not been completed to the satisfaction of the defendant *or* to the satisfaction of his surveyor. Replication, that the building was completed to the satisfaction of the defendant *and* to the satisfaction of his surveyor; without this, that it was not finished to the satisfaction of the defendant *or* to the satisfaction of his surveyor. Issue thereon. At the trial before Mr. Justice Gaselee, at the Sittings in London, there was evidence given on the part of the plaintiff that the work had been done to the satisfaction *of the defendant's surveyor*, and application was made to the learned judge to amend the record by the substitution of "or" for "and" in the replication. For the defendant it was submitted that this was not an amendment that the judge had power under the 3 & 4 Will. 4. c. 42.

of nulla bona to a fi. fa. against the goods of R. and J. S., and alleged, that, "although R. and J. S. had goods &c., within his bailiwick &c., yet the defendant did not levy the debt and damages aforesaid, but did falsely return that the said R. and J. S. had not, nor had either of them, any goods or chattels whereof he could levy the said debt and damages, or any part thereof;" the allegation (being severable) was held to be sustained by proof that R. only had goods. And in *May* v. *Brown*, 3 B. & C. 113, 4 D. & R. 670, where, in a declaration on a libel, the plaintiff, after adverting to several matters by way of inducement, alleged that the defendant published the libel of and concerning the plaintiff and the matters aforesaid, and it turned out that the libel related to some only of those matters, it was held that the averment that the libel was published *of and concerning the matters aforesaid*, did not make it necessary to prove literally that the libel did relate to all the matters previously stated. So, in *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146, it was held, that, if a plea of justification consists of two parts, each of which would, if separately pleaded, constitute a good defence, it will support the justification if one of the facts be found by the jury. In Co. Litt. 282, a., it is said—"If the matter of the issue be found, it is sufficient. The lessee covenants with the lessor not to cut down any trees, and binds himself in a bond of 40*l.* for performance of covenants, the lessee cut down ten trees; the lessor brought an action of debt upon the bond, and assigneth a breach that the lessee cutteth down twenty trees, whereupon issue is joined, and the jury find that the lessee cut down ten, judgment shall be given for the plaintiff; for, sufficient matter of the issue is found for the plaintiff." [The court called upon—

Mr. Serjeant *Atcherley* to shew that the pleadings were bad as they originally stood, without reference to the power of amendment.—The satisfaction of the defendant

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or his surveyor, was a condition precedent to the plaintiff's right to recover, therefore it was material that it should be correctly alleged. The defendant in his plea sets out the contract, negativing that the work was done to the satisfaction of the defendant *or* his surveyor. The plaintiff no doubt might in his replication have asserted that it was done to the satisfaction of the one or the other; but, having averred the satisfaction of both, he fails to sustain his issue unless he proves the satisfaction of both: the traverse must be explained by reference to the antecedent allegation, which is conjunctive. In *Goram* v. *Sweeting*, 2 Saund. 206, where the plaintiff declared that the ship, tackle, &c., were sunk and destroyed, it was held, that, if the defendant traversed the allegation, he must traverse it disjunctively. *Wood* v. *Budden*, Hob. 119, is to the same effect. And in *Moore* v. *Boulcott*, ante, 122, 1 New Cases, 323, where, to assumpsit for work and labour as an attorney, the defendant pleaded that the demand was for charges "at law *and* in equity," and no bill delivered; the plaintiff replied that the charges in the declaration mentioned were not charges "at law *and* in equity:" it was held that the replication was ill, though following the words of the plea; the plaintiff should have traversed dis-

count for work and labour, &c., the defendant pleaded in substance that the work was done under an agreement for its completion to the satisfaction of the defendant *or* his surveyor; and then goes on to state that the work was not completed to the satisfaction of the defendant *or* his surveyor—plainly implying, that, if the work had been done to the satisfaction of either, the plaintiff would be entitled to maintain his action. The replication alleges that the work was done to the satisfaction of the defendant *and* of his surveyor; it then goes on to traverse in the very terms of the allegation in the defendant's plea—without this, that the work was not finished to the satisfaction of the defendant, *or* to the satisfaction of his surveyor. That is in effect saying that it was finished to the satisfaction of the one or the other. Now, I agree that the defendant might have demurred specially to this replication on the ground that it did not tender any certain issue. But, inasmuch as he has thought proper to pass it by and take issue, and as that issue involves in it, and the plaintiff must have proved in support of it, that the work in question was done to the satisfaction of either the defendant or his surveyor, one cannot but see that justice has been done between the parties; and the objection coming after verdict, I think it ought not to prevail. The 4 Anne, c. 16, s. 1, provides that, where any demurrer shall be joined &c., the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, declaration, or other pleading &c. (except on special demurrer, &c.), so as sufficient appear in the said pleadings upon which the court may give judgment according to the very right of the cause, and therefore no advantage or exception shall be taken of or for an *immaterial traverse*. Now, what is this but an immaterial issue? The cases collected in Comyns's Digest, " *Pleader,* "(G. 22), clearly establish the proposition that the party must stand

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on the objection at once, and not speculate upon the chance of a verdict, and afterwards resort to a defect in the pleadings.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—I entertain no doubt but that the issue tendered by the replication was in substance a compliance with the terms of the contract. The evidence, it seems, shewed that the work had been done to the satisfaction of the defendant's surveyor. The defendant having taken issue and gone to trial, cannot now be permitted to complain of the slip in the replication: he should have demurred.

Mr. Justice VAUGHAN.—I am of the same opinion. The issue has been substantially proved.

Rule discharged.

Wednesday, May 6th.

ALEXANDER and Another *v.* GARDNER and Another.

The plaintiffs sold to the de-

THIS was an action of assumpsit for goods bargained and sold. Plea, non assumpsit. At the trial before Lord

:—The plaintiffs, merchants in London, were in the of receiving consignments of provisions from Messrs. hy & Sons, of Sligo; and, on the 11th October, 1833, gh a broker, entered into the following contract with efendants:—" Sold to Messrs. W. Gardner & Son, count of Messrs. Alexander & Co., two hundred fir- of Murphy & Co.'s Sligo butter, at 71*s.* 6*d.* per free on board, for first quality—4*s.* and 6*s.* difference feriors. Payment—bill at *two months from the date ding.* To be shipped *this month.* An average for ts and tares within six days of landing, if required." being no vessel at Sligo bound for London, the s were not shipped until the 6th November. This eing communicated to the defendants, they at first rred, but afterwards received and retained the in- and bill of lading. The invoice described the num- casks, weight, and price, and was addressed to the iffs: and, on receiving it, the plaintiffs (as is custom- the trade, struck out the name of their firm, and tuted that of the defendants, and in that state the e was handed over to the defendants. The bill of also directed the butters to be delivered to the plain- r order, and they indorsed it to the defendants. The on board of which the butters were shipped was in ginning of December wrecked, and part of the but- ere lost and the remainder damaged. The defen- after hearing of the loss, repudiated the contract. e trial, it was contended, on their behalf, that the for goods bargained and sold was not maintainable the circumstances of this case, but that the plaintiffs l have declared specially on the contract; that the ent of the goods in the month of October was a con- precedent to the plaintiffs' right to sue upon the ct; and that, as the butters were to be paid for by two months from the date of the landing, the land- ust take place before the period of credit would be-

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gin to run. The jury returned a verdict for the plaintiffs for 404*l.*, the invoice price of the butters—finding that the condition in the contract for the shipment of the butters in the month of October, had been waived by the defendants.

Mr. Serjeant *Talfourd*, in pursuance of leave reserved by his lordship, moved for and obtained a rule nisi to enter a nonsuit, on the grounds taken at the trial.—He submitted that goods bargained and sold will not lie unless the property in the goods passes by the contract to, and becomes absolutely and indefeasibly vested in the vendee; in support of which proposition he relied on *Simmons* v. *Swift*, 5 B. & C. 857, (*Simmons* v. *Smith*) 8 D. & R. 698, where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take it and pay for it on a day specified, and a part was afterwards weighed and delivered to him: and it was held that the property did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that, even if it had vested, the seller could not before the act had been done

cept one, and that the vendee discharged and exonerated him from making out a good title as to that lot, and waived his right to require the same: it was held that oral testimony was not admissible to shew the waiver of the vendee's right to a good title as to that lot, inasmuch as the effect of such waiver was to substitute a different contract for the one in writing. To constitute a valid bargain and sale, the goods that are the subject of it must be in existence, and be ascertained as to quantity and price, and be appropriated at the time of the sale, and such appropriation must be assented to by the vendee; and no subsequent events can dispense with any of these requisites.

Mr. Serjeant *Bompas* and Mr. *Martin* shewed cause.—With respect to the argument upon *Goss* v. *Lord Nugent*, that the waiver of the condition as to the time of payment should have been in writing, the defendants are not in a situation to avail themselves of that objection, even if it were well-founded, the point not having been mentioned at the trial, and this being a motion for a nonsuit.—The moment the butters were shipped, the shippers ceased to have any interest in them; and the property in them passed by the delivery of the invoice and the indorsement of the bill of lading to the defendants—*Lickbarrow* v. *Mason*, 6 T. R. 63, *Haille* v. *Smith*, 1 B. & P. 563, *Cuming* v. *Brown*, 9 East, 506, *Barrow* v. *Coles*, 3 Camp. 92—and the defendants might have insured them—*Hibbert* v. *Carter*, 1 T. R. 475. The true criterion in cases of this sort is, whether the contract on the part of the vendor is completed, or whether anything remains to be done to divest the property out of him, and to vest it in the vendee. In Sheppard's Touchstone, p. 221, the definition of a bargain and sale is given thus—"This word doth signify the transferring of the property of a thing from one to another, upon valuable consideration." And Mr. Serjeant Williams, in the note to *Osborne* v. *Rogers*, 1 Wms. Saund. 269. *l*, says—"The general counts may be resorted to in all cases

First point.

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where the contract is executed, and nothing remains to be done but the payment of money." And this corresponds with the rule laid down in Buller's Nisi Prius, 139, where it is said, that, "though an indebitatus assumpsit will not lie upon a special agreement till the terms of it are performed, yet when that is done it raises a duty for which a general indebitatus assumpsit will lie —*Gordon* v. *Martin*, T. 5 Geo. 2, Fitzg. 302." In *Hanson* v. *Meyer*, 6 East, 614, 2 Smith, 670, under a contract of sale whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much per cwt., by bill at two months, which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards, and fourteen days were to be allowed for the delivery, and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver to the vendee all his starch: it was held, that, under this contract, the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, and to ascertain the price. So, in *White* v. *Wilks*, 5 Taunt. 176, 1 Marsh. 2, it was held, that, by a bargain and sale of twenty tuns of oil out of a merchant's stock

made by the weight: it was held that the sale was not complete so as to pass the property, those acts not having been done by the wharfinger, nor any delivery made; and that the plaintiffs, upon the insolvency of the vendee, might countermand the delivery. But, in *Rugg* v. *Minett*, 11 East, 210, where turpentine in casks was sold by auction at so much per cwt., and the casks were to be taken at a certain marked quantity, except the last two, out of which the seller was to fill up the rest before they were delivered to the purchasers, on which account the last two casks were to be sold at uncertain quantities, and a deposit was to be paid by the buyers at the time of sale, and the remainder within thirty days on the goods being delivered; and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those thirty days, after which they were to pay the rent; and the buyers having employed the warehouseman of the sellers as their agent, he filled up some of the casks out of the last two, but left the bungs out in order to enable the Custom-House officer to gauge them, but, before he could fill up the rest, a fire consumed the whole in the warehouse, within the thirty days: it was held that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller, for it was the business of the buyers to get them gauged, without which they could not have been removed, and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was; but that the property in the casks not filled up remained in the seller, at whose risk they continued. In *Rhode* v. *Thwaites*, 3 D. & R. 293, 6 B. & C. 688, A. agreed to sell to B. twenty hogsheads of sugar out of a large quantity which he had in bulk. A. filled four hogsheads, and delivered them to B. who accepted them. A. afterwards filled sixteen other

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hogsheads, and requested B. to fetch them away, who promised to do so: it was held that the property in the sixteen hogsheads thereby passed to B., and that A. might recover the value of the whole from B. in an action for goods bargained and sold. That case is precisely in point. *Atkinson* v. *Bell*, 2 M. & R. 292, 8 B. & C. 277, and *Elliott* v. *Pybus*, 4 M. & Scott, 389, 10 Bing. 512, are also authorities to shew that a specific appropriation of goods assented to by the buyer, is sufficient to support an action for goods bargained and sold. It has been contended, on the other side, that, in order to constitute a valid bargain and sale, the goods must be in existence, and must be ascertained as to quantity and price, and must be appropriated, with the assent of the vendee, at the time of sale: and *Simmons* v. *Swift* is the authority cited to support that position. But there is nothing in that case to warrant the conclusion that is attempted to be drawn from it: the bargain there was not complete; something remained to be done by the vendor to vest the property of the bark in the vendee—the quantity and the sum to be paid were unascertained. Here, however, the butters were specifically appropriated, weighed, priced, invoiced, and shipped; and, on the 10th

be conditional: a parol dispensation in respect to the time of delivery is not affected by the statute of frauds—*Cuff* v. *Penn*, 1 M. & S. 21.—With respect to the argument that the landing of the butters must precede the right of the plaintiffs to demand payment, it is sufficiently answered by the case of *Fragano* v. *Long*, 4 B. & C. 219, 6 D. & R. 283. There, the plaintiff, who resided at Naples, ordered goods of M., at Birmingham, "to be dispatched on insurance being effected: terms, three months' credit from the time of arrival." M. effected an insurance, declaring the interest to be in the plaintiff; and, having marked the package with the plaintiff's initials, sent the goods to Liverpool, where they were delivered by M.'s agent to the owner of a vessel loading for Naples, by whose negligence they were damaged: it was held that the property in the goods vested in the plaintiff as soon as they left Birmingham; that he was liable to pay for them *whether they arrived or not;* and therefore that he was entitled to sue the shipowner for the damage done to them by his negligence. Third point.

Mr. Serjeant *Talfourd* and Mr. *F. Kelly*, in support of the rule.—The general nature of the question here has been correctly stated on the part of the plaintiffs. Upon the face of the contract three objections arise—first, that the goods that were the subject matter of the bargain and sale were not in the possession of the plaintiffs and not in existence at the time the contract was entered into—secondly, that the contract was conditional, that the goods should be shipped in the month of October—thirdly, that the payment was to be by bill at two months from the date of landing, which period has never arrived—1. At the time the contract was entered into, it is perfectly clear that the plaintiffs had no power or control whatever over the goods; the property in them therefore could not at that time be vested in the defendants by the sale: if the goods had not been shipped at all, no action could have been maintained First point.

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on the contract. *Rhode* v. *Thwaites* is distinguishable: there, the plaintiff was possessed of the article in bulk, and the only question was whether or not there had been a sufficient appropriation by the vendor, assented to by the vendee, of the portion agreed to be sold; here, however, there was no subject matter in being upon which the contract could operate or attach. *Simmons* v. *Swift* is a distinct authority in favour of the defendants.—*2.* The shipment in October was a condition precedent. It is said that the performance of this condition was waived by the defendants, and that the jury have so found: but the finding of the jury only amounts to this, that there has been a verbal waiver; and, although, the point not having been made at the trial, the defendants may now be precluded from urging it, *Goss* v. *Lord Nugent* is still available as an authority to shew that the plaintiffs should have declared specially on the contract, averring in their declaration, either the performance of the condition, or a dispensation with performance. Where all is done on both sides that is requisite to the completion of the contract, indebitatus assumpsit will undoubtedly lie: but here the contract between the parties was different from the simple bargain

Second point.

been relied on to shew that the arrival of the goods was not a condition precedent to the currency of the two months' credit. That undoubtedly would be a distinct and unanswerable authority if it had decided, that, under the circumstances there stated, an action for goods bargained and sold could have been maintained for the price. But the mere question there was, whether the consignee could maintain trover against the shipowner for damage resulting from his negligence.

Lord Chief Justice TINDAL.—The question that has been argued before us is, whether or not an action for goods bargained and sold was under the circumstances of this case maintainable. On the part of the defendants it has been contended that the plaintiffs ought to have declared specially, and that the count for goods bargained and sold is not supported by the evidence given at the trial. The original contract, which bore date the 11th October, 1833, was as follows: — "Sold to Messrs. W. Gardner & Son, for account of Messrs. Alexander & Co., two hundred firkins Murphy & Co's Sligo butter, at 71*s.* 6*d.* per cwt., free on board, for first quality—4*s.* and 6*s.* difference for inferiors. Payment—bill at two months from the date of landing. To be shipped this month. An average for weights and tares within six days of landing, if required." Upon this contract, three objections arise to the form of the present action—first, that the butters were not in the possession of the plaintiffs at the time the contract was entered into—secondly, that the condition that the butters should be shipped in the course of the current month, was not performed—thirdly, that they were to be paid for by bill at two months from the date of landing, which period (the goods being lost on the voyage) never arrived. It appears to me, that, notwithstanding these objections, the circumstances of the case are such as to render the count for goods bargained and

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point.

sold maintainable in point of law. I agree, that, in order to support such a count, the plaintiff is bound to shew that the property in the goods passed by the contract.—With respect to the first objection, I find no case that has been or could be cited which goes the length of holding that, where the goods are ascertained and appropriated by the vendor, and such appropriation assented to on the part of the vendee, the property in them does not pass from that time. In *Rhode* v. *Thwaites*, 9 D. & R. 293, 6 B. & C. 688, A. agreed to sell to B. twenty hogsheads of sugar out of a larger quantity which he had in bulk; A. filled four hogsheads, and delivered them to B., who accepted them; A. afterwards filled sixteen other hogsheads, and requested B. to fetch them away, who promised to do so: it was held that the property in the sixteen hogsheads thereby passed to B.; and that A. might recover the value of the whole from B. in an action for goods bargained and sold. In the present case, it is impossible to contend that the goods were not appropriated and that such appropriation was not assented to: the invoice was made out and transmitted to the defendants, and the bill of lading indorsed and delivered to and retained by them.—Then it is

nd point.

[redacted]

day of payment had not arrived, the butters never having been landed. But it seems to me to be perfectly clear that this stipulation was introduced merely for the purpose of giving the date of payment, and not for the purpose of making the landing of the goods a condition precedent. I see no reasonable ground of distinction in this respect between the present case and that of *Fragano* v. *Long:* there, a merchant residing at Naples sent an order to a house at Birmingham, to dispatch him certain goods on insurance being effected—terms, *three months' credit from the time of arrival;* the vendors, having marked the package with the vendee's initials, dispatched the goods by the canal to Liverpool, and effected an insurance declaring the interest to be in the vendee: at Liverpool the goods were delivered to the owner of a vessel bound to Naples, through whose negligence they were damaged: it was held that the property in the goods vested in the vendee as soon as they were dispatched from Birmingham; that the terms of the order did not make the arrival of the goods at Naples a condition precedent to his liability to pay for them, and that he might therefore maintain an action for the injury done to them through the negligence of the shipowner.—Upon the whole, it appears to me that the present case falls within the rule laid down by Mr. Serjeant Williams (2 Wms. Saund. 269 *b*, n. 2) as the result of all the authorities—"The general counts," he says "may be resorted to in all cases where the contract is executed, and nothing remains to be done but the payment of money." Here, the action was not brought until long after the time when the goods would in the ordinary course have been landed, and the two months' credit expired: and nothing remained to be done between the parties to render the contract complete. Under these circumstances, I am clearly of opinion that the count for goods bargained and sold is maintainable. Indeed, I see no objection to the plaintiffs' recovering under a count for goods sold and delivered.

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Mr. Justice PARK.—I entirely concur. The case turns solely upon the question whether or not there has been an acceptance of the goods on the part of the defendants. The condition for the shipment of the butters in the month of October having been waived by the defendants, I have no difficulty in saying that an action for goods bargained and sold is maintainable for the price. I also think goods sold and delivered might be sustained, but it is not necessary to hold that. The cases cited on the part of the defendants resolve themselves into this proposition, viz. that, where goods are sold, they remain at the risk of the vendor until he has done all that it is incumbent upon him to do to complete the contract; as, where the goods are not weighed, and the quantity and price ascertained, or there has been no specific appropriation. The present case, however, seems to me to fall precisely within *Rhode* v. *Thwaites* and *Fragano* v. *Long*. We have been pressed much with the authority of *Simmons* v. *Swift*, where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take it and pay for it on a day specified, and a part was afterwards weighed and delivered to him; and it was held that the property in the residue did not vest in the pur-

Mr. Justice GASELEE concurred.

Mr. Justice BOSANQUET.—I am of opinion that the contract in this case was *executed*, and therefore properly declared on. In order to support such an action, it is not necessary that the goods should at the time of the contract be in the actual possession of the vendor. In the present case, all had been done on the plaintiffs' part that was requisite to the completion of the transfer. It has been contended, on the part of the defendants, that the contract was special with a condition, and therefore should have been specially declared on, averring the performance of the condition, or an excuse of performance. That argument, though applicable to the case of a contract by deed, is inapplicable where, as here, the contract is by parol, and the performance of the condition precedent has been waived by the defendants: it was not necessary that the waiver should be in writing. All contracts must be declared on according to their legal effect: here, taking the whole together, the contract is in its legal effect without condition, and is properly declared on as such. The argument as to the time of payment not having arrived, is answered by *Fragano* v. *Long*. The arrival of the goods was not intended to constitute a condition precedent; but the terms used in the contract were only introduced for the purpose of denoting the period of the credit. The time of payment must be taken to have arrived, inasmuch as the time at which the butters should in the ordinary course have arrived had elapsed more than two months before the commencement of the action.

Rule discharged.

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Thursday, May 7th.

To a declaration consisting of a count on a bill of exchange and counts for work and labour, the defendant pleaded, as to the first count, that he did not accept the bill, and as to the rest non assumpsit, and afterwards obtained a judge's order for payment of money into court upon the first count. The plaintiff having obtained a verdict upon the first count, on the ground that the payment into court had not been pleaded, as required by the 17th rule of Hilary Term, 4

ADLARD *v.* BOOTH.

ASSUMPSIT on a bill of exchange, and for w labour. Plea, to the first count, that the defend not accept the bill; to the rest of the declaration, sumpsit. After having pleaded, the defendant obt judge's order for the payment of money into cou the first count, which was accordingly done; bu payment not having been pleaded, as required by t rule of Hilary Term, 4 Will. 4, the plaintiff had a upon the first count. The defendant having su upon the rest of the declaration, the prothonotary d to tax the plaintiff's costs of the action; whereupo

Mr. *Petersdorff*, on a former day in this term, ol a rule to review.—He submitted that the order learned judge should have been for the amendment plea, and not simply for payment of money into co

Mr. Serjeant *Bompas* shewed cause.—The def having pleaded, he could not without leave of the

:ney has been guilty of malpractice. Undoubt-
is had been so, we should interpose to prevent
iff from obtaining any advantage thereby. But
of the case is not made out.

it of the court concurring—

Rule absolute.

FANCOURT *v.* BULL.

Wednesday, May 6th.

H. F. being employed by the plaintiff to procure a bill to be discounted for him, placed it in the hands of the defendant for that purpose (with notice): the defendant detained the bill as a set-off against a debt due to him from H. F. and another:—Held, that H. F., having an equal interest in the event of the suit either way, was a competent witness to prove these facts, in an action of trover brought by the plaintiff for the bill.

In trover for a bill of exchange, the defendant pleaded that one H. F., who was the drawer of the bill, and the person to whose

ER for a bill of exchange. The declaration
t the plaintiff was lawfully possessed as of his
erty of a certain bill of exchange in writing,
drawn by one Hugh Fraser upon and accepted
aintiff, bearing date the 20th November, 1833,
he said Hugh Fraser required the plaintiff to
e order of the said Hugh Fraser 350*l.* three
fter the date thereof, of the value of 350*l.* of
ney &c., and, being so possessed thereof, the
fterwards, to wit, on &c., casually lost the said
hange out of his possession, and the same after-
wit, on &c., came to the possession of the
by finding: yet the defendant, well knowing
ill of exchange to be the property of the plain-
of right to appertain and belong to him, would
r the said bill of exchange to the plaintiff, al-
quested so to do, but converted and disposed of
ill of exchange to his the defendant's use; to
ge of the plaintiff of 500*l.* &c.

count the defendant pleaded—first, not guilty—
that the said bill of exchange in the declaration

me was made payable, was lawfully possessed thereof, and indorsed it to F. P., and fore the bill became due, for a good and valuable consideration, indorsed the same to t. The plaintiff replied that there never was a good or valuable consideration for ement to the defendant:—The jury having found for the plaintiff upon this issue—sed either to arrest the judgment or to award a repleader.

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FANCOURT v. BULL.

mentioned, before and at the time of the delivery thereof to the defendant as next thereinafter mentioned, was in the possession of Hugh Fraser, who was the drawer thereof, and the person to whose order the same was made payable; and that the same had been and then was indorsed by the said Hugh Fraser, and also by one Frederick Palmer; that, before and at the time of such delivery of the said bill of exchange to the defendant as aforesaid, one S. Solomonson and the said Hugh Fraser were justly and truly indebted to the defendant in a certain large sum of money, to wit, the sum of 300*l.*, for money before then received by the said S. Solomonson and Hugh Fraser to and for the use of the defendant; and thereupon, and long before the said bill of exchange had become due and payable according to the tenor and effect thereof, to wit, on the 10th December, 1833, and whilst the said S. Solomonson and Hugh Fraser continued and were so indebted to the defendant as aforesaid, the said Hugh Fraser, in consideration thereof, and also in consideration of a certain further sum of money, to wit, the sum of 60*l.*, then lent and advanced by the defendant to the said Hugh Fraser at his request, then delivered the said bill of exchange so

said F. Palmer, before the said bill of exchange had become or was due and payable according to the tenor and effect thereof, to wit, on &c., for a good and valuable consideration in that behalf, indorsed the same to the defendant, by means whereof the defendant then became and was the lawful holder of the said bill of exchange, and continued such holder thereof until and at the time of the said supposed conversion thereof in the declaration mentioned: and this &c.

Similiter to first plea. Replication to second.

The plaintiff joined issue on the first plea, and to the second replied—That the said Hugh Fraser received the said bill of exchange in the declaration mentioned, and, until the defendant became possessed thereof, held the same for a special purpose, for the sole use and benefit of the plaintiff, and not otherwise, to wit, for the purpose and in order that the said Hugh Fraser might get the said bill of exchange discounted for the plaintiff, and deliver and pay the proceeds thereof upon such discounting to the plaintiff; of all which premises the defendant at the time he received the said bill of exchange had notice; that the said Hugh Fraser, in violation of good faith, and contrary to the purpose for which he received the said bill of exchange, deposited the same with the defendant as in the second plea was alleged, and the defendant took and received the said bill of exchange well knowing and with notice of all the said premises, and that the plaintiff had not received any value for the said bill of exchange: and this &c.

Replication to the third plea.

To the third plea, the plaintiff replied, that there never was a good or valuable consideration for the said F. Palmer's indorsing the said bill of exchange to the defendant, in manner and form as the defendant had in his said last plea alleged, &c.

Rejoinder.

To the replication to the second plea, the defendant rejoined, that he had not, at the time he received the said bill of exchange in the declaration mentioned, any know-

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FANCOURT v. BULL.

ledge or notice that the said Hugh Fraser had received or held the said bill of exchange for the special purpose in the replication mentioned, for the use and benefit of the plaintiff, or that the said Hugh Fraser had deposited the same with him the defendant contrary to the purpose for which the said Hugh Fraser received the same, or that the plaintiff had not received any value for the said bill of exchange: and of this &c.

Issue was joined upon the replication to the third plea and upon the rejoinder to the replication to the second plea respectively.

At the trial before Lord Chief Justice Tindal, at the Sittings at Guildhall, after last Michaelmas Term, Fraser, the drawer of the bill, was called as a witness on the part of the plaintiff. He was objected to on the part of the defendant, on the ground of interest. His lordship thought that Fraser stood indifferent between the parties, inasmuch as he would be subject to the same measure of liability in the event of the suit either way. The objection was therefore over-ruled. Fraser stated that the bill had been put into his hands by the plaintiff for the purpose of raising money upon it for the use of the plaintiff; that he applied to the defendant to discount it, who con-

a rule nisi for a new trial, on the ground that Fraser was not a competent witness, inasmuch as he would be subject to a greater degree of liability (costs of the action) in the event of the suit one way than the other (*a*); or why the judgment should not be arrested, on the ground that, notwithstanding the finding of the jury, sufficient remained upon the third plea unanswered and admitted by the replication, to constitute a legal bar to the plaintiff's demand; or for a repleader.

As to the competency of the witness.

Mr. Serjeant *Stephen* and Mr. *Martin* shewed cause.— In order to render a witness incompetent on the ground of interest, it must appear that he has a clear and certain interest in the event of the suit one way. Where, as in the present case, his interest is equally poised, the witness's competency is not affected. If the plaintiff recovered here, Fraser would be discharged from liability for his misappropriation of the bill; if, on the other hand, the defendant obtained a verdict, Fraser would be discharged from the debt due from himself and his partner to the defendant, and also from liability to the defendant for the 60*l.* advanced to him on the bill. It is suggested that this equilibrium of interest is destroyed by the witness's responsibility for the costs of the action. But the witness could in no event be liable for those costs. In *Carter* v. *Pearce*, 1 T. R. 163, the court said: "The bare

Quære whether the 3 & 4 Will. 4, c. 42, s. 26, applies to such a case.

(*a*) A question arose as to whether the 3 & 4 Will. 4, c. 42, s. 26, applied to such a case. The learned Serjeant cited *Burgess* v. *Cutting*, 6 C. & P. 282, where Lord Lyndhurst ruled that it did, and *Mitchell* v. *Hunt*, 6 C. & P. 351, and *Harrington* v. *Caswell*, 6 C. & P. 352, where Mr. Justice Patteson ruled that it did not. And he submitted that the statute was intended to apply, not to a case where the verdict or judgment would be merely a step in the chain of evidence, not where the party has merely an interest in the result of the cause one way; but only to a case where the verdict or judgment alone would give a cause of action against the witness, and, the verdict being removed out of the way, the witness would be left in a state of complete disinterestedness.

The decision of the point, however, did not eventually become necessary.

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third plea states that Fraser
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Colour, (G), it is said: " In
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and it was said, that, if he
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whereby he became possessed of them, and converted them: it was objected, on demurrer, that the plea did not confess or deny the property, nor answer thereto: but the court held "that the plea was well enough as to that; for, when he justifies by buying in a market overt, it is thereby allowed that the property was in the plaintiff, but he is bound by that sale; and he needed not otherwise confess it." Here, the defendant's plea would be clearly insufficient without alleging that the bill was indorsed to him for a valuable consideration. In Comyns's Digest, *Pleader*, (G. 10), it is said: "A traverse ought to be of the most material thing, and the effect of the bar: and therefore in debt for rent on a lease for years, if the defendant pleads a descent to A. who was disseised by the lessor, but, after the lease, and before any rent due, entered, the plaintiff ought to traverse the disseisin, not the descent. But the defendant may traverse any part of the declaration which is material to the plaintiff's title: as, if the plaintiff alleges that A., being seised, enfeoffed B. who died seised, and the land descended to his heir, who demised to him, and afterwards A. ousted him and disseised his lessor, and conveyed to the defendant; the feoffment, descent, or disseisin may be traversed. In trespass, if the defendant pleads, that, before the trespass, A. was seised, and leased to him, the plaintiff may traverse the seisin or the lease, for both are material to the defendant's title. So, if he pleads that A., being seised, enfeoffed B., who enfeoffed C., under whom he claims, the plaintiff may traverse the seisin or any mesne feoffment, if the defendant does not claim by any mesne conveyance from the plaintiff himself." At all events, this is no ground for an arrest of judgment, which can only be applied for by reason of a defect in the declaration, not in a replication: there is no authority for the latter (*b*). Where the issue taken is immaterial, the prac-

As to the repleader.

(*b*) Mr. Serjeant *Goulburn*, amicus curiæ, mentioned the case of Wilkinson v. Malin, 2 C. & J. 636, where the motion was for an ar-

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As to the competency of the witness.

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the 60*l.* advanced by him to
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defendant failed altogether in his defence, the lien he claimed being a debt due from Solomonson & Fraser, he must sue them jointly, and not Fraser alone: so that, in any view of the case, the interest of the witness must be larger one way than the other.—Then, the third plea affords a good answer to the action, and is not impeached in any material part by the replication: the defendant is therefore entitled to an arrest of judgment—this being the converse of the case where the plaintiff would be entitled to judgment non obstante veredicto. The plea would be good and a perfect answer to the action if the allegation on which the plaintiff has taken issue in his replication had been omitted altogether. If this plea omitting that which the plaintiff has taken issue on, would be bad on demurrer, or entitle the plaintiff to judgment non obstante veredicto, every declaration on a bill of exchange would be equally bad in arrest of judgment. Suppose this had been an action by the present defendant against the plaintiff on this bill, the declaration being framed like this plea, omitting the superfluous allegation, and the matter stated in the declaration and replication had been pleaded, would it have afforded an answer to the action? Clearly not. To constitute a good defence to an action on a bill of exchange, the defendant must invalidate the consideration from beginning to end. That there may be an arrest of judgment for a defect in the replication, is a proposition that needs not the aid of authority to support it: the plaintiff is as much bound to sustain his replication as his declaration. There being therefore a perfect defence going to the whole merits of the action confessed upon the face of the record, the defendant is clearly entitled to have the judgment arrested, or, at all events, a repleader.

Arrest of judgment.

Repleader.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—

1835.

FANCOURT
v.
BULL.

As to the interest of the witness.

The defendant in this case
cause why the verdict should
ground of the improper admissi
judgment for the plaintiff shoul
pleader awarded. Upon the fir
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so as to render him an incompe
tiff. The defendant claims to r
for the debt of Fraser, for whic
to him. If the plaintiff succee
debt will immediately revive, a
cover it in an action against hin
the plaintiff fails in the action,
against the witness the amount
tained by the wrongful deliver
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the bill. And, as to the argum
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defendant, if the bill had bee
fendant to a third party for valu
is not the case between these pa
such indorsee a better title than

1835.

FANCOURT v. BULL.

Arrest of judgment.

The application by the defendant to arrest the judgment involves a question attended with greater nicety and difficulty. This application proceeds on the ground that notwithstanding the jury have found for the plaintiff upon the traverse of the single fact taken by him in his replication to the third plea, still sufficient remains upon that plea, unanswered, and admitted by the replication, to form a legal bar to the plaintiff's demand. If such be the real state of the pleadings, the inference is undoubtedly correct, that the plaintiff cannot be entitled to the judgment of the court. But, looking to the nature of the plaintiff's claim as stated in his declaration, and to the answer set up by the defendant in his third plea, we think the allegations in his third plea which remain admitted by the replication, do not constitute a legal answer to the action. This is an action of trover, in which the declaration states the plaintiff to have been possessed of the bill of exchange as of his own property, and that the defendant wrongfully converted it to his own use. The third plea purports to be a plea of property in the bill in the defendant; a defence which, according to the new rules of pleading, must be pleaded specially to the action. This plea, therefore, in order to be a valid plea, must confess and avoid the plaintiff's right of action. It does, consequently, admit the property of the bill to have been in the plaintiff, and that the defendant converted the bill to his own use: but it proceeds to introduce and allege new facts which do, the defendant contends, shew the property to have been in the defendant, or at all events out of the plaintiff, at the time of the conversion of the bill. These facts (omitting the allegation which has been negatived by the jury, and which therefore may be considered as if never inserted in the plea) are the three following—first, that, before the conversion by the defendant, Fraser, who was the drawer, and the person to whose order the bill was made payable, was lawfully possessed of the bill—secondly, that, being

right of possession, but the *pr*
been in the plaintiff, is clear fro
in the case of *Comyns* v. *Boyer*
the defendant pleaded in bar
nine oxen, that one W. White v
oxen, and sold them to the d
whereby he became possessed of
Upon demurrer, one objection
that the plea did not confess n
answer thereto. But the cour
good enough as to that: for, w
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needed not otherwise confess it."
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bill, and to have the property in
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that Palmer or the defendant t
consideration? We are of opini
facts alleged in the plea may be
property in the bill remain unal
these allegations are consistent

against the plaintiff, simply by indorsing it over: in order to give such title, the indorsee must have given value for the bill, and have taken it bonâ fide and without notice of the defect of Fraser's title. It is argued, that, in a declaration upon a bill of exchange, it is sufficient to state an indorsement, without any allegation that it was made upon a good consideration; the bare allegation of the indorsement importing that it was made for value. This is undoubtedly the case where the holder is enforcing his remedy on the bill which has been in a due course of circulation; but here, the action is brought to recover the property in the bill, not to enforce its payment. The plaintiff alleges his title, and challenges the defendant to disprove it or to produce a better. And it is manifest, on the face of the declaration, that this bill was not in a course of circulation; for, the plaintiff alleges that he was the owner of a bill drawn by Fraser upon himself, and accepted by himself, the plaintiff: whereas, a bill accepted by the plaintiff in the ordinary course of business would not have been the property of the acceptor, but of the drawer or of an indorsee. To divest such a title therefore out of the plaintiff, we think something more was necessary than a mere indorsement of the bill. In the case before cited, of *Comyns* v. *Boyer*, a possession by a stranger and sale in market overt was held a sufficient allegation in the plea to divest the property out of the plaintiff; because a sale in market overt was a title against all the world. But here, a lawful possession and indorsement, unless it was an indorsement for value and without notice of the defect of Fraser's title, would not give a good title against all the world: it would give the indorsee no better title than Fraser had himself; that is, a title of possession only, leaving the property in the plaintiff. For these reasons, we think there is no ground for arresting the judgment for the plaintiff.

As to repleader.

And, as to the award of a repleader, it is manifest that the plaintiff has taken his issue upon the only material fact

1835.

FANCOURT v. BULL.

alleged in the third plea, which traverse has been found for him. The defendant therefore can have no right to demand a repleader, where it appears that his own plea is so defective that even when unanswered it forms no bar to the plaintiff's declaration.

Judgment for the plaintiff.

Tuesday, May 12th.

The lien of an attorney upon a judgment for his costs in the particular suit, under the 93rd rule of Hilary Term, 2 Will. 4, extends to the taxed costs as between attorney and client.

WATSON *v.* MASKELL.

THE court having on a former occasion decided, upon the construction of the 93rd rule of Hilary Term, 2 Will. 4, that the lien of an attorney upon the damages and costs in a cause is confined (where there are conflicting claims between the parties) to his costs incurred in the prosecution of the particular cause—ante, p. 286—and the plaintiff's attorney having under that rule obtained costs as between party and party—a rule was subsequently obtained on the part of the executrix and executors of the deceased defendant, calling upon the plaintiff to shew cause why the money remaining in court (200*l.*) should not be paid out to them.

the rule.—The plaintiff's attorney has already, under the former rule, received all that he is entitled to, viz. the costs as between party and party. Extra costs are in no case recoverable between the parties—*Hathaway* v. *Barrow*, 1 Camp. 151, *Sinclair* v. *Eldred*, 4 Taunt. 7, *Winstanley* v. *Head*, 4 Taunt. 192, *Jenkins* v. *Biddulph*, 12 Mo. 390, 4 Bing. 160, *Webber* v. *Nicholas*, 1 R. & M. 420, *Hodges* v. *The Earl of Licthfield*, ante, 450—why, then, should the attorney's lien operate to charge them indirectly? The attorney has still the responsibility of his own client and a lien on the papers for the rest of his costs.

Lord Chief Justice TINDAL.—The question that arises upon this motion is, what is the proper interpretation of the rule referred to—whether the attorney's lien upon the judgment extends to the general costs of the cause as between attorney and client, or only to the taxed costs as between party and party. And the question involves two propositions—the one, as to what was the nature and extent of that lien before the making of the rule—the other, supposing the attorney's lien formerly to have gone to the extent now contended for, how he is to retain his lien without prejudice unless we hold him to be entitled to the full costs as between attorney and client. It seems clear, that, before the rule, the attorney had a lien against his client for the whole costs of the suit, subject to taxation; and that not merely for costs incurred in a suit at law, but for all other matters. If employed to prepare deeds, he was not bound to give them up to his client until paid his charges in respect of them. So, in the case of a judgment recovered by the client, the attorney has a lien upon the amount for his costs; so far, indeed, has this been carried, that, in one case, it was held that he was entitled to retain the money, in another to stop it in transitu; and in none of the cases has there been any mention made of this claim being limited to the costs as between party and party.

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Mr. Justice PARK and Mr. J

Mr. Justice BOSANQUET.—
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as between attorney and client

(a) It appearing that the money had already been paid out to the defendant's representatives, the rule was made absolute—to refund

1835.

Wednesday, May 13th.

HAWES and Others *v.* B. J. ARMSTRONG.

To constitute a valid agreement to answer for the debt or default of a third person, within the fourth section of the statute of frauds, it is not necessary that the consideration should appear in *express terms:* it is enough if the memorandum be so framed that a person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given.

No consideration is to be implied from an undertaking as follows—"Inclosed I forward you the bills drawn per J. T. A. upon and accepted by L. D., which I doubt not will meet due honour; but, in default thereof, I will see the same paid."

THIS was an action of assumpsit upon a guarantie. The declaration stated, that, before and at the time of the making of the promise and undertaking of the defendant thereinafter mentioned, John Thomas Armstrong and Leonard Dell were indebted to the plaintiffs in a certain sum of money, to wit, the sum of 260*l.*, and, being so indebted, the plaintiffs were desirous and urgent to be paid the same; and thereupon, on the 13th May, 1829, in consideration that the plaintiffs, at the special instance and request of the defendant, would give time for the payment of the said debt or sum of 260*l.*, and would take, accept, and receive, by way of security for the payment of the same, three several bills of exchange (amounting in the whole to 260*l.*) respectively drawn by the said J. T. Armstrong upon and accepted by the said L. Dell, and respectively bearing date the 8th May, 1829, and would forbear and give to the said Armstrong & Dell time for payment of the said debt or sum of 260*l.*, until the said bills should respectively become due and payable, the defendant undertook and then promised the plaintiffs, that, in default of the said bills meeting due honour, he would see the same paid: Averment that the plaintiffs, confiding in the said promise and undertaking of the defendant so made as aforesaid, did then, to wit, on &c., take, accept, and receive, by way of security for the payment of the said debt or sum of 260*l.*, the said three bills so drawn and accepted as aforesaid, and did forbear and give time to the said Armstrong & Dell for payment of the said debt or sum of 260*l.* until the said bills respectively became due and payable according to the tenor and effect thereof; that, although the said three bills had long since respectively become due and payable, and although the same were respectively and duly presented to the said L. Dell for payment thereof when

ment as aforesaid, or at any time
the defendant had due notice;
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Plea. The defendant pleaded, th
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charge the defendant for such

Replication. The plaintiff replied, that t

plaintiffs in the words following, that is to say—" Messrs. Hawes,—Gentlemen, Inclosed I forward you the bills drawn per J. T. Armstrong upon and accepted by Leonard Dell, which I doubt not will meet due honour; but, in default thereof, I will see the same paid. I remain &c. B. J. Armstrong, Hatton Wall, 13th May, 1829"—as by the said writing will more fully appear.

Demurrer and joinder.

Mr. *R. V. Richards*, in support of the demurrer.—Two questions arise upon this demurrer; the one, whether the memorandum was sufficient within the statute of frauds; the other, whether the memorandum was property set forth in the replication.—The statute 29 Car. 2, c. 3, s. 4, requires the promise to answer for the debt, default, or miscarriage of another, to be in writing; and ever since the decision in *Wain* v. *Warlters*, 5 East, 10, 1 Smith, 299, the word "agreement" has been held to include the consideration for the promise as well as the promise itself. That case, though its authority was much doubted at the time, has since been well established—*Saunders* v. *Wakefield*, 4 B. & A. 595, *Jenkins* v. *Reynolds*, 6 Mo. 86, 3 B. & B. 14. In the present case the memorandum contains a bare promise—" Inclosed I forward you the bills drawn per J. T. Armstrong upon and accepted by Leonard Dell, which I doubt not will meet due honor; but, in default thereof, I will see the same paid." It imports upon the face of it no consideration, no giving of time, nothing more than a promise to pay the debt of another on a certain contingency. In *Jenkins* v. *Reynolds*, the memorandum was as follows: " To the amount of 100*l.*, consider me as a security on J. C.'s account;" and it was held not to bind the defendant under the statute. So, in *Morley* v. *Boothby*, 3 Bing. 107, 10 Mo. 395, the following undertaking—" We hereby promise that your draft on W. C. & Co., due at Messrs. M.'s, at six months, on the 27th No-

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this date," was held void. Mr
consulted the other judges, ther
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the general issue. In *Saunders* v. *Wakefield*, the memorandum was set forth as here. The main question, however, is, whether or not there is upon the face of this note a sufficient consideration to support the action. All the cases cited on the other side were cases of mere naked promises, clearly without any apparent consideration. Here, the consideration was the giving of time to the principal debtor. The case of *Morris* v. *Stacey*, Holt, 153, is almost totidem verbis with the present. There, A., an agent for some manufactures, sold to B., who likewise acted as an agent, a quantity of shoes, and received certain bills of exchange in payment: B. being pressed to indorse them, refused, but wrote a letter to A., in which he inclosed the bills, and added "that, should they not be honored when due, he B. would see them paid:" it was held that this was a sufficient agreement within the statute to bind B. to pay for the goods, in default of his principal. That case was confirmed by *Boehm* v. *Campbell*, 3 Mo. 15, 8 Taunt. 679, where Lord Chief Justice Dallas says: "In *Ex parte Minett*, 14 Ves. 189, Lord Eldon expressed serious doubts of the propriety of the decision in *Wain* v. *Warlters*, and in *Ex parte Gardom*, 15 Ves. 286, his lordship decided against the rule as laid down by the court of King's Bench: but we see no reason at present to express an opinion on the case of *Wain* v. *Warlters*, as this case must be governed by that of *Morris* v. *Stacey*." And Mr. Justice Richardson adds: "The statute of frauds merely requires the agreement on which the action is brought, or some memorandum or note thereof, to be in writing and signed by the party to be charged therewith; if the intent of the parties be expressed, it is sufficient." Here, it sufficiently appears that the giving of time to the principal debtor was the consideration for the defendant's undertaking: the plaintiff was thereby induced to take the bills. If not expressly and in terms set forth upon the face of the guarantie, it is to be collected from it by fair

Chief Justice Tindal said: " Tl
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dence of any other note to which the agreement could apply. From these several authorities it seems perfectly clear that the guarantie must be construed liberally and according to the ordinary understanding of those who may be supposed to enter into such agreements.

Mr. *R. V. Richards*, in reply.—*Morris* v. *Stacey*, though ruled by one whose opinion is entitled to much consideration, is still but a Nisi Prius decision. It occurred in the year 1816, at a time when *Wain* v. *Warlters* was esteemed a doubtful case, and before it was confirmed by *Saunders* v. *Wakefield* and *Jenkins* v. *Reynolds*. *Boehm* v. *Campbell* also preceded the two last-mentioned cases. The consideration here might be an additional credit for goods to be supplied. At all events it is ambiguous. Nor does it appear that the hands of the party were tied up by the giving of the bill, any more than in the cases of *Cole* v. *Dyer* and *James* v. *Williams;* and these two cases tend to shew that it will not suffice that the consideration appears by implication only.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—

The question that has been argued before us on these pleadings is this, whether the consideration which is stated in the declaration as the ground of the defendant's promise appears upon the memorandum or note in writing signed by the defendant, which is set forth in the replication. That, in order to satisfy the provisions of the statute of frauds, the consideration upon which the promise is made must appear in the written memorandum on which the action is brought, as well as the promise itself, has been settled by the authority of numerous decisions, of which the first is that of *Wain* v. *Warlters*, 5 East, 10: the ground of such decisions being simply this, that the term *agree-*

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ten agreement, an engagment on the part of the plaintiffs to extend their credit to Armstrong & Dell; or an engagement by the plaintiffs to discount these bills for Armstrong & Dell: for, there is nothing whatever in the letter itself that necessarily connects the undertaking of the defendant with the consideration of forbearance; no expression to denote that the bills are delivered in satisfaction of or as a security for the debt then due from Armstrong & Dell to the plaintiffs; not even any mention that any debt was due to him. Undoubtedly, it is extremely probable, from the amount of the debt due from Armstrong & Dell agreeing exactly with the amount of the bills inclosed in the letter, that such bills were sent as a security for the debt then due, and, if so, that the forbearance for the time the bills had to run must have formed the ground for the promise of the defendant: but there is no *written evidence* to shew that such was the case; and, after proof of the existence of such debt by parol evidence (which might be admitted), the great link in the chain of the evidence would still be wanting, and there would be nothing but parol evidence to supply it, viz. that the forbearance of suing for that debt was the consideration for the particular promise.

Thinking, therefore, in this case, that the consideration for the defendant's promise is left in complete uncertainty upon the defendant's letter, we cannot bring ourselves to the conclusion that the memorandum is sufficient to take the case out of the statute of frauds; and consequently we hold that there must be—

Judgment for the defendant (*a*).

(*a*) In Trinity Term, 5 Will. 4, a case of *Ellis* v. *Levy* came on for argument on a demurrer to the replication. It was an action upon undertaking as follows—"Mr. R. H. C., of Barbadoes, about to proceed thither in the Mary, having incurred an account with you amounting to 49*l.* 5*s.*, with the understanding that he is to transmit the amount to you three months after he shall have arrived at Barbadoes, we guarantee his performance of the said engagement; and, in failure thereof, we will be responsible to you."

No consideration is to be implied from an

the case of a fraudulent and clandestine removal, does not attach unless the rent has actually become due before the removal of the goods.

the statute 11 Geo. 2, c. 19, s. 1
on the 25th March, 1834, and
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the following guarantie (which was set out in the replication as in the case in the text, with averments of identity): "Mr. T. Ellis, 60 Whitechapel. Mr. Richard H. Chase, of the office of Ordnance, Barbadoes, about to proceed thither in the Mary, having incurred an account with you amounting to 49*l.* 5*s.*, with the understanding that he is to transmit the amount to you three months after he shall have arrived at Barbadoes, we guarantee his performance of the said engagement; and, in failure thereof, we will be responsible to you. Isaac Levi & Co., 36 Old Broad Street, 20th November, 1833."

Mr. *R. V. Richards*, in support of the demurrer, contended that there was no consideration for the

plaintiff replied that the goods were carried away on the 24th March, 1834, and before the time when the rent became due and payable. Upon this fact the defendant Duffield took issue in his rejoinder.

At the trial before Lord Chief Justice Tindal at the last Summer Assizes at Guilford, a verdict was found for the defendant Vaughan on the plea of not guilty, and for the plaintiff as against the other defendant, Duffield, upon both the issues, damages 10*l.*—

Mr. *Platt*, in Michaelmas Term last, obtained a rule calling upon the plaintiff to shew cause why a verdict should not be entered for the defendant Duffield non obstante veredicto, on the ground that, the replication admitting the fraudulent and clandestine removal, enough remained upon the face of the plea unanswered, to preclude the plaintiff's right of action.

Mr. *Comyn* shewed cause.—The 1st section of the 11 Geo. 2, c. 19, provides, that, "in case any tenant or tenants, lessee or lessees, for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same *for arrears of rent so reserved, due, or made payable*, it shall and may be lawful to and for every landlord or lessor, landlords or lessors, or any person or persons by him, her, or them for that purpose lawfully impowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels, as aforesaid, to take and seize such goods and chattels wherever the same shall be found, as a distress for *the said arrears* of rent, and the same to sell

to of *Northfield* v. *Nightingale*, the circumstances of which do not appear, to be set up in opposition to the opinion of that learned judge.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—

This was an action of trespass against two defendants, in bar of which they both pleaded a joint plea of not guilty, and the defendant Duffield then pleaded specially, as bailiff of Vaughan, the landlord, a justification under the 11 Geo. 2, c. 19, s. 1, the plea stating that the rent for which the distress was made became due on the 25th March, 1834, and that the goods of the plaintiff were fraudulently and clandestinely carried away to prevent the distress, and that the distress was taken within thirty days next ensuing such carrying away of the goods. The plaintiff in his replication alleged that the goods were conveyed away on the 24th March, 1834, before the time when the rent became due and payable, and the defendant Duffield in his rejoinder took issue on that allegation. The jury found a verdict for the defendant Vaughan on the plea of not guilty, and for the plaintiff upon both the pleas of the defendant Duffield, with 10*l.* damages: and the case comes before us on a motion to enter a verdict for the defendant Duffield non obstante veredicto. The motion would perhaps have been more correct in point of form if it had been a motion to arrest the judgment for the plaintiff, on the ground that enough still remains upon the defendant's special plea, confessed by the plaintiff's replication, to bar the plaintiff's demand: for, we are not aware that any instance can be produced where the defendant, after an issue which he has taken has been found against him, has been allowed to have judgment entered in his own favour non obstante veredicto. But we think there is no ground whatever for the motion in the one form or the other.

'hief Justice Eyre in *Watson* v. *Main*, 3 Esp. 16, upon 'hich Lord Ellenborough appears to have doubted only, ut to have expressed no opinion, in *Furneaux* v. *Fotherby*, Camp. 136.

Rule discharged.

WILKINSON and STENNETT *v.* HALL and Another.

Friday, May 8th.

Tenants in common cannot jointly maintain an action for double value where the premises have been held over after the expiration of a tenancy from year to year, without proof of a joint demise.

DEBT for double value of premises held over, under he statute 4 Geo. 2, c. 28, s. 1.—The declaration stated, hat the defendant, before and at the time of the giving he notice to quit and making the demand thereinafter ientioned, and from thence until a certain day, to wit, the 4th June, 1834, held and enjoyed one undivided moiety r half part, the whole into two equal parts to be divided, f and in certain tenements, to wit, a certain quay or 'harf, and certain warehouses, vaults, and buildings, with he appurtenances, as tenants thereof to the plaintiff 'homas Wilkinson, and one other undivided moiety hereof as tenants thereof to the plaintiff William Stenett, that is to say, as such tenants thereof respectively rom year to year, for so long a time as the plaintiffs and efendants should respectively please; the reversion of he one undivided moiety of the said premises with the ppurtenances during all that time belonging to the plainff Wilkinson, and the reversion of the other undivided ioiety thereof during all that time belonging to the said Villiam Stennett; and thereupon, whilst the defendants so eld and enjoyed the said undivided moieties of the said nements with the appurtenances as tenants thereof to he plaintiffs respectively as aforesaid, and whilst the said eversions thereof respectively so belonged to the plainiffs respectively as aforesaid, to wit, on the 11th Decemer, 1833, the plaintiffs gave notice in writing to the dendants, and thereby demanded of and required the

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tiffs during all that time being entitled to the possession thereof as tenants in common thereof; contrary to the form of the statute in that case made and provided: and the plaintiffs further said that the whole of the said tenements with the appurtenances, during the said time of holding over the same and keeping the plaintiffs out of the possession thereof as aforesaid, were of great yearly value, to wit, of the yearly value of *200l.*; and by reason of the premises, and by force of the statute in such case made and provided, the defendants became liable to pay the plaintiffs a large sum of money, to wit, the sum of *2666l. 13s. 4d.*, being at the rate of double the yearly value of the said tenements with the appurtenances, for so long as the same were so detained as aforesaid; and thereby and by force of the statute an action had accrued to the plaintiffs to demand and have, and they thereby demanded, of and from the defendants the said sum of *2666l. 13s. 4d.*; yet the defendants had not paid the said sum of money above demanded, or any part thereof—to the damage of the plaintiffs of *200l.*

The defendants pleaded that they did not before or at any of the said times in the declaration mentioned, or at any other time whatsoever, hold or enjoy the said undivided moieties of and in the said tenements in the declaration respectively mentioned, or either of them, or any part thereof, as tenants to the plaintiffs jointly, upon any joint demise or letting whatsoever by them of the same, or any part thereof, to the defendants: and this &c.

Demurrer and joinder.

Mr. Serjeant *Merewether*, in support of the demurrer.—For the purpose of maintaining this action it is perfectly immaterial whether or not the defendants held under the plaintiffs jointly, the action not being founded in contract. Littleton says, s. *292*—"Tenants in common are they which have lands or tenements in fee simple, fee tail,

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a personal action for a matter that concerns his tenements in common, as trespass quare clausum fregit, &c., without his companion, it may be pleaded in abatement. Or an action upon the case for a nuisance. So, if he sue debt for rent reserved by them upon a lease for years. So, if they make a joint lease in tail or for life rendering rent, which is not entire, but may be divided, they shall make several avowries for the rent; for, that is incident to the reversion, which they claim by several titles." And see Com. Dig. *Abatement*, (F. 6), Sir W. Jones, 253. And in *Martin* v. *Crompe*, 1 Ld. Raym. 341, Lord Chief Justice Holt said, "that, if there are two tenants in common of a reversion expectant upon a lease for years, upon which a rent is reserved, they may join in debt for the rent or sever; and the one of them may have an action for the moiety of 20*l.* rent, but not for 10*l.*, and so it has been adjudged." So, in *Midgley* v. *Lovelace*, Carth. 289, the court held that tenants in common might either join or sever in an action of debt or covenant for rent. Here the contract is at an end; and there is no mode of arriving at the damages but by ascertaining the value of the whole estate.

Mr. *Comyn*, contra.—Undoubtedly, where two joint tenants join in granting a lease, they must join in an action for the rent. But, where the action is for rent not under a lease (as here), to support a joint action, they must shew a joint contract. In the present case, each would be entitled to receive a moiety of the yearly value: they have no joint interest in the damages to be recovered. *Powis* v. *Smith*, 1 D. & R. 490, 5 B. & A. 850, is a decisive authority. There, A. and B., being joint tenants of a dwelling-house and premises, demised the same jointly to C., in 1810, and he regularly paid his rent in one sum to their joint agent up to 1818, in which year he received notice from one of the joint tenants to pay the moiety of the rent in future to him or his agent separately, and from

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Lord Chief Justice TINDA
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demises, and not at one entire rent: so long therefore as the relation of landlord and tenant existed between the parties, there must have been separate avowries and separate actions for the rent. Now, this action, being given to enable the landlord to recover a compensation in lieu of rent, must stand in the same situation as an action for the rent itself. It follows, that, if the plaintiffs would be unable to sue in a joint action for the rent, or, in replevin, to avow jointly, they must likewise be held incapable of suing for that which the statute has substituted for the rent. In no case can parties join in an action unless they have a joint interest in the thing or the damages to be recovered therein. In the present case I can discover no joint interest the plaintiffs could have in any damages to be recovered against the defendants for holding over premises held by them under two several demises. Suppose one of the plaintiffs were to die, the tenants in common would be, the survivor, and the heir of the deceased tenant in common: whereas, the deceased's share of the damages recovered in the action would go to his executors; for, since the 3 & 4 Will. 4, c. 42, s. 2, an executor may maintain an action for double value. The case of *Cutting* v. *Derby*, 2 Sir W. Bl. 1075, is to some extent an authority for this: there, in an action for double value by one tenant in common, the court said: "Where one certain injury is done to both tenants in common, they shall have one certain remedy; but, where the injury is separate, they *may* have several actions." That case, it is true, does not shew that they *must* sever where the damage is several; but it shews that they have no joint interest in the damages; and therefore it follows that they cannot both join in the action.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—I am also of opinion that the

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1835.

LESLIE and Others, Assignees of CUMBERLEGE, the Younger, a Bankrupt, *v.* GUTHRIE.

Friday, May 8th.

In assumpsit by assignees of a bankrupt for freight due to C. (the bankrupt) before his bankruptcy—the defendant pleaded, that, before C. became bankrupt, he by indenture reciting that I. & Co. had lent C. 1600*l.*, and that I. & Co. had applied to C. to assign over to them the freight and earnings of the ship N., *on her then present intended voyage*, from London to the East Indies and back, as collateral security for the due payment of the 1600*l.* so lent to him, and of such further sums as might be due or owing from C. to I. & Co. for costs of insurance, and upon the balance of all accounts between them, not exceeding in the whole 3000*l.*; that C., for the considerations aforesaid, assigned to I. & Co., their executors, &c., all and every the said sum and sums of money that was or were due, or which should or might at any time or times thereafter arise and become due to him C. by any person or persons "for or on account of the freight, earnings, and profits of the ship N. under or by virtue of any then existing or future charterparty or charterparties, or other contract or contracts, *for or in respect of her said then intended voyage to India and back to England*"—in trust for I. & Co. to reimburse themselves the 1600*l.* and interest, together with such further sums as might be due to them upon the balance of accounts between them and C., not exceeding in the whole 3000*l.*, rendering the surplus to C.—of which assignment the defendant had notice; that C. was indebted to I. & Co. in the sum of 2384*l.* 4*s.* 11*d.*, *which sum exceeded the amount due for freight as in the declaration mentioned*:—Held, that the plea was a good answer to the action—the assignment being of the freight of a single intended voyage then in course of being performed, and there being no surplus in which the creditors of C. had an interest so as to entitle the assignees to sue as trustees.

THIS was an action of assumpsit brought by the plaintiffs as assignees of John Cumberlege, the younger, a bankrupt, to recover a sum alleged to have been due to the bankrupt before his bankruptcy for the freight of a voyage to India.

The declaration stated that the defendant, on the 1st December, 1833, was indebted to Cumberlege before he became bankrupt, in 2000*l.* for freight payable by the defendant to Cumberlege for the carriage and conveyance of goods and chattels in and on board of a certain ship or vessel whereof Cumberlege then was owner; that the defendant afterwards, to wit, on &c., in consideration of the premises respectively, then promised Cumberlege, before he became bankrupt, to pay him the said sum on request; yet the defendant had not paid the said sum of money or any part thereof to Cumberlege before he became bankrupt, or to the plaintiffs, assignees as aforesaid, or either of them, since Cumberlege became bankrupt; to the plaintiffs' damage of 2000*l.*

The defendant pleaded—That the said sum of 2000*l.* in which the defendant was in the declaration alleged to have been indebted to Cumberlege for freight, was a certain sum of money which became due for freight payable

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the said Inglis and others at or before the sealing of the said indenture, did bargain, sell, assign, transfer, and set over unto the said Inglis and others, their executors, administrators, and assigns, all and every the said sum and sums of money that then was or were due, or which should or might at any time or times thereafter arise and become due to him, Cumberlege, his executors, administrators, or assigns, by any person or persons whomsoever, *for or on account of the freight*, earnings, and profits of the said ship or vessel, the Neptune, *under or by virtue of any then existing or future charterparty or charterparties, or other contract or contracts for or in respect of her said then intended voyage to India and back to England;* and all and every policy or policies of assurance which then was or were or thereafter might be effected on the said freight or freights; and all monies which should or might become due and recoverable under or by virtue thereof, together with all charterparties, contracts, agreements, and policies of insurance relating thereto; and all the right, title, interest, &c., whatsoever, at law or in equity, of him, Cumberlege, of, in, and to the same premises and every part thereof: to hold, recover, and enjoy the said sum and sums of money so due or to become due for the freight, earnings, and profits of the said ship or vessel, the Neptune, as aforesaid, and all and singular other the premises thereby assigned or intended so to be, unto the said Inglis and others, their executors, administrators, and assigns; in trust nevertheless that they, their executors or administrators, did and should in the first place thereout deduct, retain to, and reimburse themselves the said sum of 1600*l.*, with interest for the same at and after the rate of 5*l.* per cent. per annum, together with all such further sum and sums of money as should or might be due to them upon the balance of accounts between them and Cumberlege, and also all such sum and sums of money as might be paid by them for insurance of the said freight or

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denture in the said plea mentioned, no charterparty, contract, or agreement whatsoever for or in respect of the said freight of the said ship or vessel during the voyage of the said ship or vessel from the East Indies to England, and for and on account of which voyage the said sum of 2000*l.* in the declaration was mentioned to have become due and payable, had been or was made, entered into, or agreed upon by or on behalf of Cumberlege, then being the owner of the said ship or vessel as aforesaid; and that no freight or money in respect thereof was then due or owing to Cumberlege, in respect of the said voyage in the indenture mentioned: and this &c.

Demurrer and joinder.

Sir *W. Follett*, in support of the demurrer.—The replication being clearly ill as tendering an immaterial issue, the question will be whether or not the plea affords a sufficient answer to the action. It will be contended, on the part of the plaintiffs, that the assignment of freight therein mentioned was not a valid assignment; and in support of that argument *Robinson* v. *Macdonnell*, 5 M. & Sel. 228, will be relied on. There it was held that an assignment of the freight and profits of a ship does not extend to profits not in existence, actual or potential, at the time of the assignment; therefore, where C. assigned by deed to S. the freight, earnings, and profits of the ship W., which ship afterwards in a voyage to the South Seas obtained a quantity of oil, the produce of whales taken in the voyage—it was held that this oil did not pass to S. by the assignment, for the assignor had no property, actual or potential, in the oil at the time of the assignment, and the voyage was not then contemplated. Lord Ellenborough there observed that, "if that deed is to extend to all freight, earnings, and profits in subsequent voyages, it is open to the objection made by the Lord Chancellor in *Speldt* v. *Lechmere*, 13 Ves. 588, that it will for ever separate the

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considering the question, to say that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first-intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings for ever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid." *Douglas* v. *Russell*, 4 Sim. 524, is a direct authority upon the point. There, A., a shipowner, assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. The outward freight was paid to A. before the ship sailed. The charterparty was afterwards delivered to B. by A.'s direction, and B. gave notice of the assignment to C. Afterwards, but before the ship returned, A. became bankrupt. It was held that the homeward freight was not in A.'s order and disposition at his bankruptcy, and that B. was entitled to it. Upon the authority of these cases, it is perfectly clear that the assignment in question was at least valid in equity. The plea avers, and the replication admits the fact, that the bankrupt was indebted to Messrs. Inglis & Co. in a sum exceeding the amount of freight earned.

The plaintiffs, as assignees of Cumberlege, and clothed with all his rights and liabilities, both legal and equitable, cannot maintain an action for the money which a court of equity would compel them to restore. In *Gladstone* v. *Hadwen*, 1 M. & Sel. 526, Lord Ellenborough cites the case of *Scott* v. *Surman*, Willes, 404, where Lord Chief Justice Willes says: "My notion is (and that opinion is confirmed by many authorities cited by Mr. Durnford in a note), that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estate of their ancestors and testators; but that nothing vests in these

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the charterparty to another, if she earns freight, the assignee of the ship is entitled to the freight as incident to the ship—*Morrison* v. *Parsons*, 2 Taunt. 407; though it is otherwise where the owner becomes bankrupt pending the voyage the ship is performing at the time of the assignment—*Speldt* v. *Bowles*, 10 East, 279, *Chinnery* v. *Blackburne*, 1 H. Bl. 117, n., 3 Doug. 391. An assignment of a debt is not sufficient to pass the property, unless assented to on the part of the debtor—*Crowfoot* v. *Gurney*. In *Ex parte Monro*, Buck, 300, a bond debt was assigned by the obligee, and the bond delivered to the assignee, but notice of the assignment was not given to the obligor previously to the bankruptcy of the obligee: and it was held that the debt remained in the order and disposition of the bankrupt within the statute 21 Jac. 1, c. 19. In *Cuxon* v. *Chadley*, 3 B. & C. 391, 5 D. & R. 417, J. C. being indebted to S., and R. C. being indebted to S. and also to J. C., it was orally agreed between the three that S. should transfer the debt due to him from J. C. to the account of R. C., and S. in pursuance of such agreement delivered to R. C. an account in which R. C. was charged with the debt due from J. C. to S.: and it was held that J. C. was not thereby discharged. The doctrine of that case is assented to in *Wharton* v. *Walker*, 4 B. & C. 163, 6 D. & R. 288, and in *Best* v. *Argles*, 2 Cr. & M. 394. From all these authorities it is perfectly clear that there can be no assignment under circumstances like the present which the law can contemplate as conveying away the bankrupt's interest so as to affect the rights of his assignees, whatever the relative rights of the parties might be in equity. At all events, according to the authority of *Carvalho* v. *Burn*, the assignees alone are competent to sue for the freight, though equity may compel them to account. Mr. Justice Littledale, in delivering the judgment of the court in that case, said: "If, at the time of the act of bankruptcy, the bankrupt possessed a possibility of interest from which a benefit to his creditors might re-

Lord Chief Justice TINDAL.—The question is, whether or not, upon the facts appearing upon the pleadings in this case, the right to the freight earned by the ship Neptune on the voyage in the plea mentioned passed to the assignees of Cumberlege; because, if the right either legal or equitable passed to any third person before the bankruptcy of Cumberlege, the claim of the assignees is unfounded. The argument urged on the part of the plaintiffs rests upon two grounds; the one, founded upon the supposed authority of *Robinson* v. *Macdonnell*, that the right to freight not earned at the time, but to arise upon a future contract, cannot be the subject matter of an assignment; and undoubtedly, if the rule is to be understood as broadly as it is laid down in some parts of that case, as this was a contract for freight not actually earned, it would not pass by the assignment, and consequently the plaintiffs would be entitled to sue. The second ground urged was, that, if there be any reversionary interest in the assignees, they take the legal interest, and they are the persons who must sue for it: and for this is cited *Carvalho* v. *Burn*. The case of *Robinson* v. *Macdonnell* does certainly lay it down generally that an assignment of the future earnings of a ship is not good. It is to be observed, however, that that is not the only ground upon which Lord Ellenborough relied; there were other grounds perfectly distinct from that to warrant the judgment of the court. But, even supposing that that was the sole ground of the decision, there is a material distinction between that case and the present. The words of the assignment in that case were very large and general: and Lord Ellenborough observed, that if it were to extend to all freight, earnings, and profits in subsequent voyages, it would be open to the objection made by the Lord Chancellor in *Speldt* v. *Lechmere*, that it would for ever separate the ship and earnings. No such inconvenience is to be apprehended in this case. The assignment here was not

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to pay the freight had notice of the assignment. I think there was a good and valid assignment in equity, and one which a court of equity would lend its aid to carry into effect. The next question is, whether *Carvalho* v. *Burn* applies to the present case. Although the general rule is, that, in the case of an equitable assignment of a chose in action, if there remains in the transferror, or, in case of his bankruptcy, in his assignees, any reversionary interest, the latter must sue for and recover the demand, and afterwards answer over in equity—there is an allegation in this declaration that puts an end to any objection arising on that score, viz. that the assignment was made to secure a sum due from the bankrupt to Inglis & Co. exceeding the amount due for freight. There is therefore no residuary benefit for the assignees to take, and no reason why they should sue. This was all the defendant need shew to entitle himself to our judgment.

Mr. Justice PARK.—The degree of weight due to the case of *Robinson* v. *Macdonnell* has been already so fully discussed that it is unnecessary for me to add any thing on that subject. Lord Eldon entertained considerable doubt as to the propriety of that decision. The case of *Ex parte Monro* has been particularly pressed upon us: and it has been contended, that, although it is averred in the plea that the defendant had notice of the assignment, it was necessary also to aver that he assented to the arrangement. I think, however, there is no authority for that proposition. If the assignment were not under seal, that might be so; though that even I do not find to be clear. Here, however, the assignment was under seal. In *Ex parte Monro*, where a bond debt was assigned by the obligee, and the bond delivered to the assignee, but notice of the assignment was not given to the obligor previously to the bankruptcy of the obligee, the court held (and, I think, correctly) that the debt remained in the

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Mr. Justice Bosanquet.
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1835.

THOMPSON *v.* SHEDDON.

Tuesday, May 12th.

The sheriff is not entitled to costs under the interpleader act, unless his application to the court is rendered necessary by gross misconduct on the part of the claimant.

THE sheriff having seized goods, a claim was made, and a rule was obtained under the interpleader act in order to bring the parties before the court. The claimant however not appearing—

Mr. *Whateley*, on the part of the sheriff, prayed that he might have his costs. He referred to the 6th section of the 1 & 2 Will. 4, c. 58, which places the costs at the discretion of the court. It appeared, however, that, before the sheriff applied for the rule, he had received notice that the claim was abandoned.

Lord Chief Justice TINDAL.—The sheriff is extremely well off as he stands at present. I am not disposed to give costs in any case under this act, except where there has been grossly improper conduct in the party as against whom the costs are sought. The sheriff should not have come to the court after he had had notice that the claim was abandoned.

Rnle discharged (*a*).

(*a*) See Barker v. Dynes, 1 D. P. C. 169, Bryant v. Ikey, 1 D. P. C. 428, Bowdler v. Smith, 1 D. P. C. 417, Field v. Cope, 2 C. & J. 480, Bishop v. Hinxman, 2 D. P. C. 166, Tucker v. Morris, 1 C. & M. 73, Anderson v. Calloway, 1 C. & M. 182, Philby v. Ikey, 2 D. P. C. 222, Dabbs v. Humphries, ante, p. 325.

BRADLEY *v.* MILNES.

Wednesday, May 13th.

Where a defendant obtains costs under the 43 Geo. 3, c. 46, s. 3, on the ground that the arrest was without reasonable or probable cause, neither party is entitled to the costs of a prior unsuccessful motion to enter a nonsuit.

THE plaintiff in this cause having obtained a verdict for 44*l.* 14*s.* 10*d.*, a rule for entering a nonsuit, on the ground

Mr. Serjeant *Talfourd*, o
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Lord Chief Justice TIN
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Wednesday, May 13th.

An affidavit of justification stated the deponent to be possessed of a certain sum "over and *all above* his just debts:"—Held, sufficient.

HOUSLE

MR. *BALL* opposed the
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1835.

HOUSLEY v. BOYD.

An affidavit stating that the deponent's property consists of "a freehold house, situate &c.," without stating its value, is sufficient.

Mr. *Ball* further objected that the affidavit failed to comply with the rule in another particular. The form given by the rule requires the value of each item of property to be stated: here, the affidavit merely stated that the deponent's property consisted of a freehold house, situate &c.

The Filacer stating the practice to be, to require the value to be stated where the property consists of several items, but not where it consists of one only—

Mr. Justice PARK also over-ruled this objection.

Bail justified.

Costs.

Mr. *Archbold* then asked for and obtained his costs of justification.

DOE *d.* BRENAN *v.* GLENFIELD.

Tuesday, May 12th.

The assignment of the estate and effects of an insolvent debtor under ss. 11 and 19 of the 7 Geo. 4, c. 57, vests in the assignees any copyhold property the insolvent may possess, so as to enable them to maintain ejectment for the recovery of it. The entry on the court rolls of the manor, required by s. 20, is only necessary to enable the assignees to convey the property to a purchaser.

THIS was an action of ejectment brought by the lessor of the plaintiff, the assignee of the estate and effects of one John Otto Koops, an insolvent, to recover possession of certain copyhold premises situate at Poplar, of which the insolvent was duly admitted tenant at a customary court of the lord of the manor of Stepney on the 15th August, 1828, on the surrender of a Mrs. Groves. At the trial before Lord Chief Justice Tindal at the sittings at Westminster after the last term, it appeared that there had been no surrender by the insolvent, nor any entry of admittance on the court rolls either of the provisional assignee or of Brenan; but merely an entry of the assignment of the insolvent's estate and effects to Brenan, and of his claim to be admitted tenant of the copyhold, in the margin of the steward's minute book. On the part of the de-

that the surrender and presentment might be proved by the draft of an entry produced from the muniments of the manor and parol testimony of the foreman of the homage who made such presentment. Lord Tenterden there, citing an anonymous case from Lord Raym. 735, says: "The dispute was between the lord and the devisee of the copyholder, and Lord Holt, C. J., was of opinion, as against the lord, that the rough draft of the surrender and admittance made by the steward of the manor was admissible evidence. It certainly does not appear in that case whether a fair roll had been engrossed and lost by the lord; but I cannot think that that is material, for the draft is not properly speaking a copy, but is the original from which the fair roll is afterwards made out. The draft itself is more in the nature of an original than the fair copy, though the latter is more convenient for reference, and therefore is the document which is generally resorted to." The assignee is not to be prejudiced by the delay of the steward. Minutes of proceedings of inferior courts are frequently admitted in evidence—*Rex* v. *Hains*, Comb. 337, *Fisher* v. *Lane*, 2 W. Blac. 834. This is an inferior court, not a court of record.

Mr. Serjeant *Talfourd*, in support of his rule.—Before the passing of the 6 Geo. 4, c. 16 (ss. 68, 69), copyhold property of a bankrupt did not pass by the general assignment to his assignees. The simple question here is, whether the 11th section of the 7 Geo. 4, c. 57, passes such property of an insolvent to the provisional assignee, without a compliance with the formalities required by the 20th section. If the court shall be of opinion that that provision applies only to the case of a conveyance by the assignee to a purchaser, undoubtedly the lessor of the plaintiff in the present case is entitled to maintain the ejectment: otherwise there must be a nonsuit.

seems to me that the statute has substituted a new mode of conveying copyholds, first to the provisional and afterwards to the general assignee; and that the entry on the court rolls is only necessary in the event of a sale by the assignees, in order that the conveyance may not appear to have been made by a stranger.

Mr. Justice PARK.—I am of the same opinion. The 11th and 20th sections being read together, it is impossible to doubt that the correct construction has been put upon the statute by the counsel for the lessor of the plaintiff.

Mr. Justice GASELEE.—Regard being had to the time at which the conveyance from the insolvent to the provisional assignee is directed to be made—at the time of presenting his petition—it is clear that the assignment alone vests his copyhold property in the assignees. The 11th section provides, that, "in case the petition of any such prisoner shall be dismissed by the said court, such conveyance and assignment shall from and after such dismission be null and void to all intents and purposes." If anything more had been required to be done in order to effectuate the conveyance of copyhold property, the legislature must, in the event of the insolvent's petition being dismissed by the court, have gone on to direct the retractation of all that had been done in the copyhold court.

Mr. Justice BOSANQUET.—I am of the same opinion. Nothing can be more general than the language of the 11th section of the statute, which vests in the provisional assignee all the estate and effects of whatever description of the insolvent. The same language is employed in the 19th section, with respect to the transfer by the provisional to the general assignee—" And when such assignee or assignees shall have signified to the said court his or their

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The court will not, pending an action against an attorney for penalties for acting without having caused his admission to be inrolled, allow his name to be entered upon the roll nunc pro tunc.

Ex parte SWIFT.

MR. *F. Robinson* moved that the name of the applicant, an attorney of this court, might be entered upon the roll as of the day of his admission, in Trinity Term, 1833. The affidavit upon which the motion was founded disclosed the facts that appear in the report of *Humphrys* v. *Harvey*, 4 M. & Scott, 500, 1 New Cases, 62; and stated that an action had been brought (and was now pending) against Mr. Swift by one Mathews, a clerk to the attorney who acted for the plaintiff in *Humphrys* v. *Harvey*, for the recovery of the penalty of 50*l.* imposed by the statute 2 Geo. 2, c. 23, for acting as an attorney in the conduct of the defence in that cause without being duly inrolled. —A similar application was acceded to in *Ex parte Fry*, 3 D. P. C. 338. It is true that there no penal action was depending against the party, as here. But the inrolment of an attorney's admission is nothing more than the mere entry upon record of a fact the omission of which may at any time be supplied, the court being satisfied that such omission was not the result of any improper conduct of the party. Amendments must in every case operate to the benefit of one party and the injury of the other: yet *Mellish* v. *Richardson*, 7 B. & C. 819, and many other cases, shew that the courts will in the exercise of an equitable discretion permit amendments to be made even in particulars more material than that which is sought in the present case.

Lord Chief Justice TINDAL.—I fear we have no authority to grant this application. Undoubtedly, if the rights of a third person did not intervene, we should be very ready to lend our aid to extricate the individual in question from the situation in which he has innocently placed himself. But, an action having already been commenced

parliament made and passed in the 2 Geo. 2, intituled "An act for the better regulation of attorneys and solicitors," according to the directions of that act, against the form of the statute in that case made and provided; whereby, &c. *To the plaintiff's damage of* 100*l.*, &c.

The defendant demurred specially, assigning for causes, that the plaintiff in and by his declaration had claimed *damages;* whereas the action was brought for penalties in which the plaintiff had no interest until the commencement of the action: and also that it ought to have been distinctly alleged in the declaration that the defendant, at the time of the committing the said supposed offences in the declaration mentioned, was not admitted and inrolled as an attorney of the court of Common Pleas; whereas it only appears in and by the said declaration, that he was not admitted and inrolled as an attorney in some one of the courts mentioned in the statute passed in the 2 Geo. 2.

Mr. Serjeant *Bompas,* on a former day, obtained a rule calling on the defendant to shew cause why, upon payment of costs, the plaintiff should not be at liberty to amend his declaration by substituting "Common Pleas" for the words in italics at the commencement, and to expunge those at the end.

Mr. *F. Robinson* shewed cause.—Under the very peculiar circumstances of this case, the purposes of justice having already been answered by the defendant's loss of costs in *Humphrys* v. *Harvey,* the court will not exercise their discretion in favour of the present plaintiff, when by so doing they would be inflicting upon the defendant still further punishment for that which was originally rather the fault of the officer of the court than the fault of the defendant himself. Amendments are nearly as much discountenanced in penal actions as in writs of right. Thus, a new trial will not be granted in a penal action, unless

tion, Lord Kenyon says: "The best principle seems to be that on which Lord Harkwicke relied (in *Rex* v. *Ellames*, Rep. temp. Hardw. 42), that an amendment shall or shall not be permitted to be made as it will best tend to the furtherance of justice."] Justice will be best attained here by dealing out to the parties that which the legislature have thought fit to call justice. In the majority of cases of informations, the defendants have incurred no moral guilt: but the plaintiff is not the less entitled to the aid of the court in the enforcement of his claim.

Lord Chief Justice TINDAL.—The authorities have distinctly laid it down that amendments are in all cases in the discretion of the court, and only to be permitted for the furtherance of justice. I admit that this discretion of the court must be bounded by rules that may be understood. But at the same time I think we are at liberty to look into the particular circumstances of each case, and into the subject matter of the action, to see that the amendment prayed will operate in furtherance of justice. In the present case the action is brought for a breach of the law which occurred rather through the want of proper care on the part of an officer of the court than from any neglect or misconduct of the defendant himself. The case was a new one; and, we thought, not within the meaning, though certainly within the strict letter of the act. Under these circumstances, if we have any discretion at all in the matter, I think that discretion we shall best exercise by holding our hand, and not permitting the amendment sought.

Mr. Justice GASELEE concurred.

Mr. Justice VAUGHAN.—If it be necessary to ask for the assistance of the court, and we have power to withhold it, I think this a very proper case for such an exercise of our discretion. We have something like judicial notice

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The conusee died in England after the taking of the acknowledgments of two of three conusors in India, and before the taking of the acknowledgment of the third in this country—The court allowed the fine to pass as to the two former only.

GRIFFITH'S Fine.

IN this case two of the conusors resided in India, a third in England. After the acknowledgment of the two former and before that of the latter had been taken, the conusee died in this country.

Mr. Serjeant *Merewether*, on behalf of the conusors, moved that the fine might be allowed to pass. He admitted that he could find no authority precisely in point; but he submitted that the court had always strained their power to the utmost to give effect to these assurances of the law, as they have been called.

Lord Chief Justice TINDAL.—The case seems to be analogous to that of the death of a plaintiff in a common law action after the defendant has come to terms with him, and before they have put their agreement into form. Perhaps we may let the fine pass valeat quantum: I do not see that any one can be prejudiced by it.

Mr. Justice BOSANQUET.—I think the fine may pass as to the two conusors in India; but there seems a difficulty as to the third, whose conusance was not taken until after the death of the conusee; as to him, therefore, there must be a new acknowledgment under the statute (*a*).

Fiat.

(*a*) 3 & 4 Will. 4, c. 74 (s. 3), which passed in the interval between the taking of the acknowledgments of the parties in India and the death of the conusee.

and also before the said bill of exchange thereinbefore firstly mentioned became due and payable according to the tenor and effect thereof, to wit, on the 25th November in the year aforesaid, in consideration that Rankine, at the request of the defendant, would cancel and destroy the said last-mentioned bill of exchange for 165*l.* 4*s.*, and would not require the defendant to deliver the said pipe of port wine according to the said agreement in that behalf, the defendant promised Rankine before he became bankrupt to accept divers, to wit, three other bills of exchange to be respectively drawn by the said Rankine upon the defendant, to wit, a bill of exchange to bear date the 15th November in the year aforesaid, for the payment of the sum of 45*l.* three months after the date thereof, another bill of exchange to bear date the 25th November in the year aforesaid, for the payment of the sum of 50*l.* three months after the date thereof, and a third bill of exchange for the payment of the sum of 110*l.* 3*s.* to be drawn at such time and to bear such date as to allow the defendant ten months for the payment of the said sum of 110*l.* 3*s.*, being the balance then due and owing from the defendant to Rankine upon the account aforesaid, and to deliver the said last-mentioned three bills of exchange to Rankine, so accepted as aforesaid, when the defendant should be thereunto afterwards requested: and the plaintiffs averred that Rankine, confiding in the said promise of the defendant, did afterwards and before he became bankrupt, and also before the said bill of exchange thereinbefore firstly mentioned became due and payable according to the tenor and effect thereof, to wit, on &c., cancel and destroy the said last-mentioned bill of exchange for 165*l.* 4*s.*, of which the defendant then had notice; and, although the defendant, in part performance of his said promise, did afterwards and before Rankine became bankrupt, to wit, on &c., accept the said several bills of exchange for the payment of the said several sums of 45*l.* and 50*l.*, and deliver the same

manner and form as the plaintiffs had above complained against him &c.—Secondly, to the first count of the declaration, that, before and at the time of the date and issuing forth of the fiat in the bankruptcy under and by virtue of which Rankine was found and adjudged to be such bankrupt as aforesaid, to wit, on the 13th January, 1834, the said Rankine was indebted to the defendant in the sum of 300*l.* for money by the defendant before then lent and advanced to, and paid, laid out, and expended for Rankine, at his request, and for money by Rankine before then had and received to and for the use of the defendant; that the said sum of money still remained unpaid and unsatisfied to the defendant; and that the defendant had not, when he gave credit to Rankine in respect of the said sum of money or any part thereof, notice of any act of bankruptcy by the said Rankine committed: which said sum of money so due, unpaid, and unsatisfied to the defendant as aforesaid exceeded any demand of Rankine before his bankruptcy and of the plaintiffs as assignees as aforesaid since the said bankruptcy in respect of the matters in the first count alleged: of all which premises the plaintiffs had notice before and at the time of the commencement of this action, and out of and against which said sum so due, unpaid, and unsatisfied to the defendant as aforesaid, the defendant was ready and willing and thereby offered to allow and set off the full amount of such demand: and this &c.—The third plea, to the remaining counts, was similar to the second.

Demurrer to the second plea.

The plaintiffs joined issue on the first plea, and demurred to the second, assigning for causes—that the debt in that plea mentioned as due to the defendant, and the cause of action in the first count of the declaration mentioned, were not mutual debts or mutual credits capable of being set off against each other; that the cause of action in that count was not one to which a set-off could be pleaded; and also that the second plea was pleaded to the first count only

his second and third pleas may be perfectly true, and yet the plaintiffs may be entitled to recover. Suppose the plaintiffs to have a good cause of action against the defendant upon one count to the extent of 100*l.*, and upon a second to the same amount, and the former are indebted to the latter in the sum of 150*l.*, and the defendant pleads as here a set-off of the entire sum to each count, how could the plaintiff safely take issue on either of these pleas? [Mr. Justice *Bosanquet*.—Should you not have replied that the set-off was insufficient to cover both demands?] That was unnecessary, for the pleas do not shew that it was sufficient. If issue were tendered upon each plea, and the verdict on each found for the defendant, the judgment must be given for the defendant, though the plaintiffs had a clear right of action. This therefore is an exception from the general rule, that, in considering the sufficiency of one plea, reference cannot be had to another plea upon the same record.

2. The demand of the defendant is in its nature such that it cannot be made the subject of a set-off at all: there is no debt, no mutual credit. The 6 Geo. 4, c. 16, s. 50, enacts, "that, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt

issued, and before the action brought by the assignees, it was held that he was entitled to set off the same under the words "mutual credit" in the 5 Geo. 2, c. 30, s. 28. It has been held that a mere deposit of goods for the purpose of work being done upon them, confers upon the bailee the right to set off his general balance, in an action brought against him for the goods. The generality of that doctrine, however, is restricted by the case of *Rose* v. *Hart*, 8 Taunt. 499, where Lord Chief Justice Gibbs, speaking of the 5 Geo. 2, c. 30, s. 28 (which provision is similar to the 6 Geo. 4, c. 16, s. 50), says: "Something more is certainly meant here by *mutual credits* than the words *mutual debts* import; and yet, upon the final settlement, it is enacted merely that one *debt* shall be set against another. We think this shews that the legislature meant such *credits* only as must in their nature terminate in *debts*, as, where a debt is due from one party, and credit given by him on [to] the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with: but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute." According to this rule, the only question is, whether this is a credit which must necessarily terminate in a *debt*. The very ground of the action however is, that the demand was one that did not terminate in a debt. In *Glennie* v. *Edmunds*, 4 Taunt. 775, it was held that the underwriter cannot set off as a mutual credit a loss accruing after the bankruptcy of the assured, against premiums of the same and other policies due before the bankruptcy from the

teral liability: "the damages (as Mr. Justice Taunton says) were unliquidated, and their amount dependent on circumstances:" the acceptor might have paid the bill, or a part of it. In each of the other cases cited, the aid of a jury was necessary to ascertain the amount of the set-off claimed. Where, however, by the mere application of numbers, the amount can be ascertained, there the party has a right of set-off. In *Utterson* v. *Vernon*, 3 T. R. 539, it was held, that, where a creditor has a debt which is capable of being ascertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved under the commission.

Mr. Serjeant *Stephen*, in reply.—*Rose* v. *Sims* was not decided upon the narrow ground suggested: and there, as in *Sampson* v. *Burton*, the amount of the set-off was capable of certain and easy adjustment.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—

In this case the plaintiffs have taken two objections to the special plea of the defendant pleaded by him to the first count of the declaration, one a formal objection assigned for cause of special demurrer, the other an objection in point of law.

First point.—Semble, that two pleas of set-off may be pleaded to two several counts of a declaration: or, if demurrable, that it must be on the ground of misjoinder.

As to the formal objection, we think the plaintiffs cannot avail themselves thereof in the present state of the record. The plaintiffs have demurred specially to the first plea of set-off, pleaded to the first count, and have traversed the second plea of set-off, pleaded to the second count. As against the plaintiffs, therefore, who have denied the facts stated in the second plea to be true, it may be taken that the facts alleged in it are not in existence, that is, as if there was no set-off in point of fact against the second count of the declaration. The plea of set-off to

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ground of demurrer; for, the
the record is as much to be
the other there.

Second point.

With respect to the object
the first plea of set-off, the q

payment of the remainder of the price of certain goods sold and delivered by the bankrupt to the defendant: and the bill of exchange is expressly alleged in that count to have been drawn " for the balance then due and owing from the defendant to the said bankrupt upon the account aforesaid." In substance therefore the bill, if accepted, would have been a security for the payment at a future day of a settled and ascertained balance due upon an account in which the price of goods sold to the defendant formed one side, and partial payments made by the defendant the other side. It is to be observed further, that the plaintiffs, although they have brought a special action of assumpsit, have stated no special damage in their declaration: so that the measure of damage to which the jury would be confined in their verdict is necessarily a mere matter of calculation, viz. the amount for which the bill was drawn, together with interest due upon it if the time of payment was passed; or the amount of the bill minus the discount if the bill was not then due. And the question is, whether this is such a *credit* given by the bankrupt to the defendant as comes within the meaning of the clause above referred to. The principle which the bankrupt laws seem to have had in view, from the earliest time to the last provisions made therein, is this, that, where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side. That this was the practice of the commissioners of bankrupt long before any statutory provision on the subject, appears clear from the two earliest decided cases—*Anonymous*, 1 Mod. 245, before Lord Chief Justice North, and *Chapman* v. *Derby*, 2 Vern. 117, in the year 1689. The first statute that made any express provision on the subject was the expired statute 4 & 5 Anne, c. 17. By that statute it was enacted, in the 11th section, that, where there hath been mutual credit given between the bankrupt and any debtor,

the enactment in the 5 Geo. 2, c. 30, s. 28, and lays great stress upon the circumstance that it is enacted merely in the final words of the clause, "that one *debt* shall be set against another." But, in point of fact, the law of set-off at that time was governed, not by the 5 Geo. 2, c. 30, only, but also by the 46 Geo. 3, c. 135, s. 3, by which latter statute it was enacted, as before observed, that "one *debt* or *demand*" may be set off against another: and it is difficult to see for what purpose such latter word can have been introduced, and have been since continued in the 50th section of the last bankrupt act, except for the purpose of giving a greater latitude than the strict meaning of the word debt would of itself import. Without, however, relying on the inference from the introduction of the word "demand," and taking the explanation of the word "credit" with the restriction adopted by the courts of Common Pleas and King's Bench, we think the claim of the bankrupt in this case is one which would in its nature terminate in *debt* and nothing else. If the demand had not been enforced until after the time for which the bill was to run, the demand became actually a debt for which the bankrupt might have brought his action for goods sold, or on an account stated. If enforced before the time had expired, his demand was one which must become a debt in a short time, and of which the present value was determinable by deducting the discount for the time the bill had still to run. And, as to the case of *Rose* v. *Sims*, we think the present case may well be distinguished from it. In that case a special action was brought for not *indorsing* a bill of exchange according to an agreement: if the indorsement had been made, it would not in its nature necessarily have terminated in a *debt* from the defendants; for, the acceptor would have been the debtor, the indorsee a guarantee only.

Upon the whole, the demand appears to us to be a mere pecuniary demand, which the commissioners or assignees might have stated in account between the defendant

man indorsed the same to Thomas Bailey without any value or consideration for so doing; and that Bailey indorsed the same to the plaintiffs without any value or consideration for so doing, and the plaintiffs took and had always held and now hold the said bill without value or consideration for their having been or being the holders thereof—concluding with a verification. The like was pleaded to the second count.

Replication.

To each of these pleas the plaintiffs replied—That the said Thomas Bailey did not indorse the said bill of exchange without value or consideration for so doing; but that the plaintiffs took and have always held and now hold the bill for value and for a good and valuable consideration; and this they pray may be inquired of by the country.

Demurrer.

Demurrer—assigning for causes, that the plaintiffs had not in either of these replications stated or shewn what was the value or consideration for and in respect of which they took the said respective bills of exchange, or the nature or description of such value or consideration, or by whom such value was received, or to whom the consideration moved, or when the same arose; that the said replications, after stating such value or consideration should respectively have concluded with a verification and not to the country; that the allegation in each of the said replications, that the said Thomas Bailey did not indorse the bill without value or consideration, was an improper and inartificial form of traverse, and was not an apt and proper traverse of the averments in the first and second pleas, that the bills were respectively indorsed to the plaintiffs without value or consideration; and that it was not admitted or shewn in the replications that the consideration was between the plaintiffs and the said Thomas Bailey for the said indorsement.

The plaintiffs joined in demurrer.

Mr. *R. V. Richards*, in support of the demurrer.—The

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sufficient. In debt on bond, to a plea alleging generally that the bond had been obtained by fraud and covin, a replication simply traversing the fraud and covin is sufficient. The authority for the instance adverted to by me in *Bramah* v. *Roberts*, of a plea by an executor of outstanding judgments, is to be found in 9 Rep. 110. It is said that the court of Exchequer, in *Lowe* v. *Eldred*, intimated an opinion, that, in an action brought upon a promise to pay the debt of a third person, the general replication that there was an agreement or memorandum in writing signed by the defendant, was no answer to a plea alleging the want of such agreement or memorandum: and the case of an award is instanced, where it is said, that, upon a plea of no award made, the replication is required to set forth the award; and other instances are cited in which the like is said to be necessary. That may be so, because, in those cases, it is for the court and not for the jury to judge as to the sufficiency of the written instrument or award, &c. But, in the present case, it is for the jury to say whether or not a full and valuable consideration has been given: and I am of opinion that these replications are amply sufficient to raise that question.

Mr. Justice PARK.—I am of the same opinion. This case is much more favourable for the defendant than that of *Bramah* v. *Roberts*. In that case it was admitted (ante, 358) that, if the plea were confined to a simple allegation of want of consideration, the general replication as pleaded here would suffice.

Mr. Justice VAUGHAN and Mr. Justice BOSANQUET concurring—

Judgment for the plaintiffs.

penses and Rickmansworth debts in full, and then took upon himself the payment of the said demands, debts, and expenses; whereof the defendant had notice: yet the defendant did not nor would perform the said agreement, but wholly neglected and refused (although often requested so to do) to make the first payment of the said sum of 220*l.* so agreed to be paid by the defendant towards the household expenses at Holloway as aforesaid, which said first payment thereof, amounting to a certain sum of money, to wit, 110*l.*, under and by virtue of the said agreement or memorandum in writing, became due and payable, and ought to have been paid by the said defendant at Michaelmas-Day last, and the same still remained wholly due and unpaid; and the plaintiff, by reason thereof, was forced and obliged to pay and was liable to pay the same out of his own monies: to the damage of the plaintiff of 120*l.*

The defendant pleaded, that, at the time of the supposed signing by the defendant of the supposed memorandum in writing in the declaration mentioned, and before and at the time of the commencing of this suit, the plaintiff was solely liable to make to the said Messrs. Horne & Gates the payments the supposed agreement by the plaintiff to make which was by the supposed memorandum in writing stated to be in part the consideration for the defendant's agreeing as was alleged to be in the said supposed memorandum in writing agreed by the defendant; and that the plaintiff was, at the said time of the supposed signing by the defendant of the said supposed memorandum in writing, and before and at the time of the commencing of this suit, solely liable to pay the said household expenses and Rickmansworth debts in full, the supposed agreement by the plaintiff to pay which household expenses and Rickmansworth debts in full was by the said supposed memorandum in writing stated to be in part the consideration for the defendant's agreeing as was alleged to be in the said sup-

which discountenances all pecuniary bargains having a tendency in restraint of future marriages, or with a view to promote separations—*Woodhouse* v. *Shipley*, 2 Atk. 535, *Baker* v. *White*, 2 Vern. 215, *Hall* v. *Potter*, 3 Lev. 411, *Lowe* v. *Peers*, 4 Burr. 2225, *Hartley* v. *Rice*, 11 East, 22, *Tennant* v. *Braie*, Toth. 78, *Brown* v. *Peck*, 1 Eden. C. C. 140, *Key* v. *Bradshaw*, 2 Vern. 102. Deeds of separation have been reluctantly admitted by the courts to be valid—*Lord Rodney* v. *Chambers*, 2 East, 283, *Durant* v. *Titley*, 7 Price, 577, *Jee* v. *Thurlow*, 2 B. & C. 547, 4 D. & R. 11, *Fletcher* v. *Fletcher*, 2 Cox, 99, *Westmeath* v. *Westmeath* (or *Salisbury*), 1 Dow, N. S. 519, 5 Bligh, N. R. 339. Lord Eldon, in *St. John* v. *St. John*, says (11 Ves. 532): "Is the husband, according to the policy of the law, capable of making such a contract? As to the case of *Guth* v. *Guth*, 3 Bro. C. C. 614, I feel with Lord Rosslyn all his doubts upon that case (*a*); which, notwithstanding what is said in *Lord Rodney* v. *Chambers*, is the only instance in which the court did enforce the deed. The question has never been put upon the contract of the husband and wife. The court has always put it upon the contract between the husband and the trustee; from the covenant of the trustee to indemnify the husband against her debts; the existence of which covenant ought to have reminded the court that those who framed these instruments had no idea that the wife herself was bound." It no where appears upon this record that the defendant was a trustee for the wife; and therefore the main ground upon which deeds of this description have been upheld, viz. the covenant of the trustee to indemnify the husband against the wife's debts, which is the consideration for his execution of the deed, fails in the present case. And it is only where the separation has actually been effected, and the trustee is party to the deed, that his covenant takes effect—*Ste-*

(*a*) See Legard v. Johnson, 3 Ves. 361.

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WAITE v. JONES.

phens v. *Olive*, 2 Bro. C. C
refused to carry into effect
v. *Jacob*, 3 Mer. 268, *Will*
a provision for a future sep
law—*Hindley* v. *The Marq*
200, 9 D. & R. 351: thoug
v. *Bird*, 2 Sim. & Stu. 372,
party to execute a deed of
which certainly excited gre
cumstances were very peculi
sideration for the defenda
more than an engagement
provide funds for the paym
already liable; and therefo
v. *Watson*, Peake's N. P. C
129, 2 Camp. 317, *Barbe*
(where all the cases are coll
v. *Byers*, 1 Ad. & E. 106.

Mr. *Richards*, in reply.—
the defendant, that such a
facie good: if it was intend
particular ground of object

two distinct parts—the one, the plaintiff's executing the deed of separation alluded to in the declaration—the other, his agreeing to pay Messrs. Horne & Gates, and certain household expenses and debts, in full. Now, it may be conceded at once, that, if either part of the consideration is shewn to be illegal, the whole is vitiated. *Featherston* v. *Hutchinson*, Cro. Eliz. 199, is a direct authority to that point. If, therefore, we can see in this case that part of the consideration was illegal, the plaintiff will not be entitled to recover. It is said, that, taking the whole record together, part of the consideration will appear to have been the execution by the plaintiff of the deed of separation between the plaintiff and his wife. It is scarcely necessary to say that a promise to pay money in consideration of a future separation, would be illegal and void. The question is whether this is the fair and necessary intendment upon the face of this record. We have no more right to impute to a party an intention to do an illegal act, than to impute fraud; and I think nothing appears here to warrant us in concluding that the parties were stipulating for any other than an innocent act. It appears from the record that the deed of separation was already in existence, though not executed by the husband; and that such deed did provide for the payment of an annuity. One cannot understand this in any other way than that the annuity mentioned in the deed of separation, was an annuity payable by the husband (the defendant) for the separate maintenance of his wife. I am at a loss to conceive why some third party might not step forward, and, in order thus to secure a provision for the wife, undertake to do something which the husband would otherwise be liable to do, to induce him to execute the deed. If there were any illegality in the transaction, it would have been very easy for the defendant to state upon the record the facts which constituted such illegality. It seems to me that, so far as it appears upon this record, the consideration for the de-

who undertook as stated in the declaration, was a third person acting as trustee. All this, however, is mere conjecture. It is enough for us to say that we cannot upon the face of this record discover that there was any illegality in the consideration given for the defendant's undertaking, and that we are not entitled to assume that there was.

Judgment for the plaintiff.

CURTIS and ANDREWS, Executors, &c., *v.* SPITTY.

Tuesday, June 19th.

In debt for rent against an assignee, the declaration stated that *all* the estate &c. of the lessee in the premises by assignment came to the defendant. The defendant in his plea took issue upon this averment. At the trial it appeared that the defendant was assignee of *a part* only of the premises:—Held, a fatal variance.

THIS was an action of debt for use and occupation brought by the plaintiffs as executors of one John Curtis, deceased, to recover a sum of 11*l.* 14*s.* for thirteen years' rent reserved upon an indenture of lease between John Curtis (the testator) and one William Copping, of which lease the defendant was alleged to be the assignee. The first count of the declaration stated a demise by the testator to William Copping on the 24th April, 1800, for ninety-nine years if certain persons (some of whom are still living) should so long live, at the yearly rent of eighteen shillings; and that, "on the 1st January, 1816, all the estate, right, title, and interest of the lessee of, in, and to the said demised lands and premises, with the appurtenances, by assignment thereof then and there made, came to and vested in the defendant;" and that a certain sum became due to the lessor for rent of the premises after the assignment. The defendant pleaded, first, non est factum, and in his second plea to this count traversed the averment that all the estate &c. came to and vested in the defendant, in the words of the declaration; and issue was joined on that traverse. At the trial before Mr. Justice Littledale, at the last Summer Assizes for the county of Essex, it appeared in evidence, that, in 1813, the

The issue raised by the second
for the defendant, and the verd
found for the plaintiff—

Mr. *Thesiger*, in Michaelma
rity of *Hare* v. *Cator*, Cowp. 7(
against the defendant charging
estate &c. in certain premises,
him to be assignee of *part only*,
—obtained a rule nisi to enter
upon the issue raised by the se

Mr. Serjeant *Wilde* and M
Term, shewed cause.—The fac
Hare v. *Cator* do not raise the
perty came to the defendant by
in the judgment. That case th
Merceron v. *Dowson*, 5 B. &
however, the facts did raise the
of the court was directly the c
Cator. There, in covenant aga
the plaintiff declared that all t
defendant by assignment, and t
were out of repair; the defen
for one period he was possessed
mises as tenant in common wi

stance. "Where an estate is divided," says Mr Justice Bayley (8 D. & R. 267), "the division is such as either to pass separate interests to separate persons, or to pass undivided interests. In the present case, the division is of the latter kind; and the question then is, whether, under such circumstances, the defendant is liable to be charged as the plaintiff charges him. Now, the declaration certainly charges him as the assignee of all the interest of the original lessee, A. B., and it is but just that the plaintiff should be allowed to adopt the general form of pleading, because it cannot be supposed that he is acquainted with the particulars of the defendant's title." The assignee, on the other hand, may protect himself by properly pleading: he may discharge himself by shewing that he is assignee of part only of the premises. See *Duppa* v. *Mayo*, 1 Wms. Saund. 282, and the notes. Covenant lies against the assignee of a lessee of an estate for a part of the rent, as in such case the action is brought on a real contract in respect of the land, and not on a personal contract; and in case of eviction the rent may be apportioned, as in debt or replevin; though it is otherwise in covenant against the lessee himself, who is liable on his personal contract—*Stevenson* v. *Lambard*, 2 East, 575: and see the notes to *Thursby* v. *Plant*, 1 Wms. Saund. 241 et seq. There will be no hardship or inconvenience in holding the defendant liable in this action, for the verdict will not bind him in any subsequent action: to render the verdict available, it must have reference to the same subject-matter—*Robinson's* case, 5 Rep. 32, b., *Reid* v. *Jackson*, 1 East, 355, *Outram* v. *Morewood*, 3 East, 345.

Mr. *Thesiger* and Mr. *Steer*, in support of the rule.—The proper remedy of the lessor is against the lessee, or by distress. But, where he elects to charge the assignee in an action of covenant or debt, it is incumbent upon him to ascertain the nature and extent of his interest in the

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the assignee—*Congham* v. *K*
Gammon v. *Vernon*, 2 Lev.
against the assignee of a moie
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whole cause of action, was in

to the extent of his separate interest. *Duppa* v. *Mayo* was the case of a rent-charge, which is not apportionable by the act of the parties: nor does it appear whether the defendant held in severalty or otherwise.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—This case is brought before us upon a motion on the part of the defendant, by leave of the learned judge who tried the cause, to enter a verdict for him upon the issue raised by the second plea, which is pleaded to the first count of the declaration. The first count of the declaration states a demise by the plaintiff's testator to one Copping for ninety-nine years if certain persons should so long live (some of whom are still in life), at the yearly rent of eighteen shillings; and that, "on the 1st January, 1816, all the estate, right, title, and interest of the lessee of, in, and to the said demised land and premises with the appurtenances, by assignment thereof then and there made, came to and vested in the defendant;" and that a certain sum became due to the lessor for rent of the premises after the assignment. The second plea to this first count traverses the averment that all the estate &c. came to and vested in the defendant, in the very words of the declaration; and the issue was joined upon that traverse. At the trial it appeared in evidence, that, in 1813, the premises comprised in the lease were divided into three separate parcels, and put up to sale in three lots, by the executor of Copping, the lessee; and that the father of the defendant purchased one of the parcels, which was duly assigned to him for all the residue of the lessee's interest in the term; which interest in such parcel is now vested in the defendant as his personal representative. And whether upon this evidence the defendant is entitled to have the verdict entered for him upon the issue raised by the second plea, is the only question before us. That the issue has been found for the defendant in

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CURTIS v. SPITTY.

the precise terms in which it is raised, there can be no doubt; and, if so, we feel difficulty in seeing upon what principle we can look further into the question intended to be raised between the parties, in this stage of the proceedings; more particularly as the case of *Hare* v. *Cator*, Cowp. 766, is a direct authority upon the very point, that, if the plaintiff alleges in his declaration that the whole interest of the lessee came to him by assignment, and the defendant traverses the allegation, it is a fatal variance if it appears in the evidence that the defendant was assignee of parcel only of the land originally demised. It must be admitted that the observations made in the course of the argument upon that case have excited some doubt as to the accuracy of the report. But the argument of the counsel and the judgment of the court preclude the possibility of doubt that the proposition with which the court meant to deal was this, that, even if the defendant was assignee, he could be assignee of part of the land only, and that the plaintiff, having alleged in his declaration that he was assignee of the whole, was out of court. And as that case has been regarded as law in Westminster-Hall from the time of its decision down to the present day, we do not think ourselves authorised to over-rule it, where the party who is to be

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remedy by a direct *action of debt against the assignee*, which action, depending as it does upon the privity of contract being transferred to the assignee, by reason of the privity of estate, that is, by reason of the plaintiff being landlord and the defendant tenant of the same land, opens a very nice and difficult question not settled by any decision in the books, so far as we can ascertain, viz. whether there exists a privity of estate in respect of the whole land by an assignment of part only. If the proposition of the plaintiff be the law, then the lessor would have had a good cause of action if he had stated his title in the declaration according to the fact, and had rested his demand for the whole rent upon the assignment to the defendant of part only of the demised premises; and the question might then be raised upon the record by demurrer; or the plaintiff might, by a special demurrer to the plea, have raised the same question: but he has thought proper to go to trial upon the issue tendered to him by the defendant. Under these circumstances, we think we are not justified in saying more on the present occasion than that we think the issue has been found against the plaintiff, and therefore the verdict is to be entered for the defendant. If another action is brought, either party may put the question on the record.

Rule discharged.

FINNERTY v. SMYTH.

Saturday, May 2nd.

The date of the jurat of an affidavit upon which a judge's order had been obtained, having been altered by the attorney's clerk without re-swearing.—The Court set aside the order obtained thereon.

A summons was taken out for setting aside a judgment of nonpros, upon which the judge, thinking the judgment had been somewhat prematurely signed, made an order for setting it aside on payment of costs. A rule for rescinding that order having been obtained on the ground that the attorney's clerk had without the knowledge of the judge written "peremptory" on the summons —the Court discharged the rule, but ordered the attorney to pay the costs.

THIS was an action of assumpsit for work and labour. The defendant pleaded non assumpsit, a set-off, and payment. On the 9th December, 1834, the defendant ruled

plaintiff obtained an order of
(amongst other things) setting
summons was without the auth
learned judge, marked " peren
to the same effect was taken o
before Mr. Baron Gurney, wh
ordered that, on payment of c
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be set aside.

On the 3rd and 5th, Janu
summonses for further and
defendant's set-off, upon whi
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the same had been sworn.

The defendant in person, in
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The prothonotary now repo
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other rule, the prothonotary stated that it appeared from the affidavits produced before him that the copy of the summons of the 27th December marked "peremptory," had been so marked by a clerk of the plaintiff's attornies before the original summons had been obtained, and served upon the defendant by another clerk, whilst the former was attending at the judge's chambers to obtain the original. But it appeared that the plaintiff's attornies were wholly ignorant both of the fact of the summons being marked peremptory, and of the alteration in the jurat of the affidavit.

Mr. Serjeant *Atcherley* shewed cause.

Lord Chief Justice TINDAL.—The prothonotary has certified to us that he thinks the rule obtained by the defendant for setting aside the order of my Brother Gaselee for further and better particulars of the defendant's set-off, should be made absolute. I think so too. The alteration of the jurat after the affidavit upon which that order was obtained had been sworn, was a most unwarrantable and improper act, though probably done without any improper intention. Still I think an affidavit so tampered with is not to be received in court.—The other rule seems to me to stand on a different footing. That rule seeks to set aside an order of Mr. Baron Gurney for setting aside the judgment of nonpros. The ground upon which the defendant seeks to set aside that order is, that the copy of the summons upon which the proceedings before that learned judge were founded, was, without the knowledge of the judge from whose chambers it emanated, marked "peremptory." I think the court ought to visit with severity parties who take upon themselves to vary the terms of a summons, so as to prevent a repetition of such fraudulent conduct, which, if permitted lightly to pass, might create great confusion and uncertainty in the practice at chambers. But, at the same time, we must deal out even

clerk do not appear to have
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imputation beyond what is r

The rest of the court con

MEMC

The Judges who sat in the cou
ceding term, were—Lord Chief J
Mr. Justice GASELEE, and Mr. Ju
was absent on Monday and Saturd
sat in the court of Chancery as on

Lord Lyndhurst, in this term, r
in commission. The lords comm
Rolls (Sir C. C. Pepys), The Vice
Justice Bosanquet.

Sir E. B. Sugden, Lord Chancel
ceeded by Lord Plunkett.

Sir F. Pollock and Sir W. W.
General) also resigned, and were s
R. M. Rolfe, Esq., who was afterw

Basil Montague, Robert Alexa
Lincoln's Inn, took their seats wit
his majesty's counsel.

INDEX.

ABANDONMENT—*See* INSURANCE.

ABATEMENT—*See* PLEADING, 2.

ABSTRACT—*See* VENDOR AND PURCHASER.

ACCORD AND SATISFACTION—*See* PLEADING, 12.

ACKNOWLEDGMENT.

Certificate of.

1. To meet the special circumstances of the case, the court directed the commissioners for taking the acknowledgment of a married woman (an infant) in their certificate made in pursuance of the 3 & 4 Will. 4, c. 79, s. 84, to omit the words "of full age." In re Sarah Luke, 80.

Affidavit of Verification.

2. The affidavit verifying the certificate of the acknowledgment of a married woman taken by commission under the 3 & 4 Will. 4, c. 74, s. 83, may be filed subsequently to the filing of the certificate. Anonymous, 52.

ACTION ON THE CASE—*See* CASE.

AFFIDAVIT.

To hold to Bail.

1. An affidavit to hold to bail stated the defendant to be indebted to the plaintiff in 300*l.* for money paid &c. to and for his use and at his request, and for interest due and owing from and *agreed to be paid* by the defendant to the plaintiff for and in respect thereof:—Held, sufficient. Hutchinson v. Hargrave, 269.

2. In an affidavit to hold to bail on a bill of exchange, it suffices that the time the bill had to run, and the fact of its being overdue, appear, though the date of the bill is not mentioned. Shirley v. Jacobs, 67.

And see ARREST—BAIL BOND, 2.

rule upon which it is sought to use

Verifying Certificate of Acknowledgmen

AMENDMENT.

Of Process.

1. A capias cannot be amended of action for another. Mills v. Ge

2. The court or a judge has n dorsed upon a writ of summons, so sheriff. Trotter v. Bass, 403.

3. The court refused to allow an the prejudice of the bail; but gran giving the bail time to render the d

4. Where the word "execution" the indorsement on a writ of capi bail bond to be cancelled, but al payment of costs. Shirley v. Jacc

Of Pleadings.

5. Under particular circumstanc ment on a rule for entering a nonsu grant leave to amend the declara thoarp v. Bryant, 338.

6. Where the defendant, after a rer, obtained an order of a judge at the argument, to amend his ple which the court would have permit to them, a rule for discharging the on the terms of the defendant pay tun, 424.

7. After argument and *judgme* murrer, the court will not allow

AMENDMENT.

Of Pleadings—(Continued.)

allowed the declaration to be amended, on payment of costs, but required a special application for that purpose. Munkenbeck v. Bushnell, 569.

Of Fines and Recoveries.

9. Where, in the indentures of a fine, lands were described erroneously as situate in a parish different from that mentioned in the deed to lead the uses—The court refused to amend, the error being cured by the 3 & 4 Will. 4, c. 74, s. 7. Lockington, conusor, Shipley, conusee, 263.

ANNUITY.

A joint *and several* annuity granted by two persons, one of whom is an infant, though void as to the infant, by the statute 53 Geo. 3, c. 143, s. 8, is still good as against the other grantor. Gillow v. Lillie, 597.

APPROPRIATION—*See* GOODS BARGAINED AND SOLD.

ARBITRATION.

By the terms of an order of reference, the arbitrator was, amongst other things, to determine whether a certain agreement had been entered into between B. and W. upon some and what representations, and whether the same were unfounded, and to award compensation to the party injured thereby, if he should think fit; to decide the terms upon which the agreement was to be cancelled; and also which of the parties had a right to receive bills of costs for business done for the connection of W. since a given day. The arbitrator found that there had been misrepresentations on the part of W.; but he awarded to B. no specific compensation for such misrepresentations, having taken the same into account on the final settlement directed between the parties. He also found that B. was entitled to receive the bills of costs above mentioned; and directed that B. should be at liberty to collect the same, and to use the name of W., either alone or jointly with his own, if necessary, in suing for the same:—Held, that the arbitrator had not exceeded his authority. Burton v. Wigmore, 610.

ARREST—*See* PLEADING, 23—PRACTICE, 1, 4, 6, 7, 8.

A party cannot be held to bail for arrears of a fee-farm rent issuing out of premises situate in Scotland. M'Kenzie v. Johnson, 594.

ARREST OF JUDGMENT—*See* PLEADING, 28.

ASSIGNMENT—*See* INSOLVENT DEBTOR.

Of Freight—See FREIGHT.

Of Lease—See PLEADING, 25.

ASSUMPSIT—*See* PLEADING, 1—20.

Semble, that assumpsit is the proper form of action (and not case for an excessive distress) to recover back a sum alleged to have been overpaid

all cases be a personal service, unl
catur has been seen in the actual
Warne, 537.

2. Where, in a country cause, c
to be paid "to the party or his att
in the country is sufficient to foun
non-payment, although the agent
on the record. Dennett v. Pass, 5

3. And see Doe d. Chippen v. R

Against the Sheriff—See SHERIFF, 1.

ATTORNEY.

Inrolment.

1. Entry of admission of, Reg. (

2. Termage fees payable by, to (

3. The court will not, pending
penalties for acting without havin
inrolled, allow his name to be ent
Ex parte Swift, 705.

4. In an action against an atto
as an attorney without inrolment,
discretion, refused to permit the p
after a special demurrer—the circ
defendant only to have been guilty
Matthews v. Swift, 706.

Bill of Costs.

5. The court has no common la
for taxation. Ex parte Bowles's T

6. An attorney's bill containing ch
is not therefore taxable under the 2

Lien for Costs.

ATTORNEY.

Lien for Costs—(Continued.)

tends to the taxed costs as between attorney and client. Watson v. Maskell, 658.

9. In an action against three defendants, a verdict was found against one, and in favour of the other two:—Held, that the costs of the successful defendants might be deducted from the amount of damages and costs payable to the plaintiff by the other defendant, without regard to the lien of the plaintiff's attorney. George v. Elston, 518.

Rights, Privileges, and Liabilities.

10. To assumpsit for work and labour as an attorney, the defendant pleaded that the demand was for charges "in law *and* in equity," and no bill delivered. Replication, that the charges mentioned in the declaration were not for charges "at law *and* in equity:"—Held, on special demurrer, that the replication was ill, though following the words of the plea: the plaintiff should have traversed disjunctively, in the words of the statute. Moore v. Boulcott, 122.

11. Quære whether an attorney of the King's Bench sued by writ of summons in this court, can plead his privilege in abatement? Davidson v. Chilman, 117.

12. At all events such plea must be verified by affidavit, or the plaintiff may treat it as a nullity, and sign judgment. Id.

13. The court refused to grant a rule calling upon an attorney to shew cause why he refused to obtain the signature of counsel to a special case settled by a master in chancery in pursuance of an order of the Vice-Chancellor. Mostyn v. Champneys, 57.

And see ATTACHMENT.

AUCTION—*See* SALE.

AWARD—*See* ARBITRATION.

BAIL.

Notice of Bail.

1. A notice of bail omitting to state the residence of the bail "for the last six months," is an irregularity of which the court will take notice, though the bail be unopposed. Sywood v. Dogherty, 79.

Notice of Justification.

2. The days between Thursday next before and Wednesday next after Easter Day, are not to be reckoned in notices of justification of bail. Cumming v. Pullen, 538.

Affidavit of Justification.

3. An affidavit of justification stated the deponent to be possessed of a certain sum "over and *all above* his just debts:"—Held, sufficient. Housley v. Boyd, 698.

4. An affidavit stating that the deponent's property consists of "a freehold house, situate &c.," without stating its value—is sufficient. Id.

BANKRUPT.

Act of Bankruptcy—(Continued.)

the 16th January to the holders of bills to become due in February, praying for time, were held admissible for the purpose of shewing him to be in embarrassed circumstances, and as tending to give a colour to his absenting himself from his home and business from the 16th February to the 9th March. Smith v. Cramer, 541.

Reputed Ownership.

2. One D., a coal-merchant, had in his possession at the time of his bankruptcy several barges, two of which had formerly been his own property, but had been sold by him to the defendant, from whom he then hired the whole of them from year to year. The name and number of D. were painted on them, and D. was registered as the owner in the books of the waterman's company. In order to rebut the inference arising from these facts that the barges were property in the possession, order, and disposition of the bankrupt, so as to pass to his assignees under the 6 Geo. 4, c. 16, s. 72, evidence was given of the existence of a custom in the coal trade, well known and established for at least twelve years, for merchants to hire barges, and to use them with their own names painted thereon, where the hiring was for a permanency. It was left to the jury to say whether the evidence established a custom of so general a nature and so notorious as that it might fairly be presumed to be known *to all persons engaged in the coal trade*, or residing in the neighbourhood where the bankrupt carried on his business, or to those persons who dealt or were likely to deal with him. The jury having found a verdict for the defendant, affirming the custom, the court refused to set it aside, holding the direction to be correct, and the verdict warranted by the evidence. Watson v. Peache, 149.

Fraudulent Preference.

3. The defendants, bankers, discounted for B., a customer, two bills, one of which was accepted by L. for B.'s accommodation, and the payment of the other guaranteed by L., due respectively the 8th and 10th of January. On the 3rd January, B., who was in a state of insolvency, went to the defendant's banking-house, accompanied by L., and paid in to his account with them a sum sufficient to cover the two bills, and then drew and gave to L. two cheques for the amount of the bills, which cheques L. handed over to the defendants in satisfaction of the bills. B. committed an act of bankruptcy on the 9th of January:—Held, that this was not a fraudulent preference of the defendants, so as to entitle the assignees of B. to maintain an action against them for money had and received; the preference, if any, being given to L. Abbott v. Pomfret, 470.

4. A fiat in bankruptcy issued against the defendant on the petition of the plaintiff. After the fiat, and before the choice of assignees,

Rose v. Main, 127.
And see PLEADING, 27.

BARON AND FEME—*See* HUSBAND AN

BILLS OF EXCHANGE AND PROM

Notice of Dishonor.

1. The notice of dishonor of a
party to whom it is addressed, ei
sary implication, that the bill h
holder looks to him for payment.

2. The attorney of the holder o
it had been dishonored by the acc
stating that a bill for 683*l.*, draw
bearing the indorsement of the
dressed, had been put into the h
with directions to take legal meas
immediately paid to the attorney:-
of dishonor to enable the holder
an action upon the bill. Id.

3. A bill of exchange was due
a notary, and dishonored; on Mon
was given by the notary to the ho
evening of the same day gave n
into the twopenny post so late tha
the Tuesday morning. All the p
that the notice was in time. Pool

Illegality of Consideration.

4. To an action on a promiss
fendant on the 12th December, 1
to the order of K., and by K. ind
pleaded, that, on the 23rd July,
A., and that the note was given
evidence was, that, in July, 1833,
change for 87*l.*, payable six month

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Illegality of Consideration—(Continued.)

5. Semble, that the infirmity of the bill would also avoid the substituted note, upon a plea properly framed. Id.

And see PLEADING, 3, 4, 15, 16, 17, 19, 28.

CASE.

For Obstructing a Right of Way.

The plaintiff was entitled to a right of way along a watercourse from a navigable river to a certain close. The defendants, who were also possessed of land on either side of the stream, situate between the river and the plaintiff's close, erected across the stream a bridge with a tunnel under it, thereby permanently obstructing the plaintiff's right. It appeared in evidence, that before and at the time of the erection of the bridge and tunnel, and at the time the action was brought, there had been such an accumulation of mud in the watercourse that for several years it had been impassable:—Held, that the obstruction being of a permanent nature, and therefore an injury to the plaintiff, by putting his right into hazard, and preventing the actual enjoyment of it whenever he might think fit to resume it, he was entitled to maintain an action, even though he received no immediate damage thereby. Bower v. Hill, 526.

And see PLEADING, 21.

CERTIFICATE OF ACKNOWLEDGMENT—*See* ACKNOWLEDGMENT, 1.

CHARTER.

Consequences resulting from the Acceptance of—See CORPORATION.

CHARTERPARTY.

Construction of.

By a charterparty it was agreed that the ship should proceed with a certain cargo from London to Oporto; and, should the master think it possible to enter the port, without risk from the batteries (then in possession of Don Miguel's forces on both banks of the Douro), the cargo was to be discharged there; if not, the master was to proceed off the castle of the Foz, or to some other point near the bar, where the vessel could lie in safety, and there discharge into boats, which the freighters were to bring alongside the vessel. Freight to be paid in full for the voyage, 475*l.*, or, *if the vessel could enter Oporto, discharge, and reload there*, then the sum of 300*l.* only. Twenty-five working days to be allowed for unloading the cargo: the lay days to commence when the ship was off the castle of the Foz, or other point where she was to be discharged, continue whilst there, cease if blown off the coast by stress of weather, and recommence when at anchor at her station: 4*l.* per day demurrage over and above the said laying days. The ship arrived off the bar of Oporto on the 3rd June, but, by reason of the Miguelites being in possession of

demurrage down to the 29th August,
blown off the coast, and prevented fron
for seven days, and having on the 26th
eighths of the cargo were discharged o
the harbour. The master there obtaine
the plaintiffs' right to the larger freight
the twenty-five laying days, the vessel b
port; and also that they were entitled
June to the 29th August, including tw
charge had proceeded. Gibbens v. Bui

COMMON.

Pur Cause de Vicinage.

1. By an act for inclosing lands in
therein named was authorized, by notic
the church door, to direct all or any par
B. common to be extinguished or susp
that all such rights of common as the c
be extinguished or suspended, should, fr
notice on the church door, *cease* and *b*
accordingly, and that if, during or after s
ment, any of the commoners, *or any*
their cattle &c. to depasture on the com
any other of the commoners to distrain
act further provided that the allotments
within a given time be inclosed or fen
the persons to whom the allotments shou
replevin for taking the cattle of the pla
joining parish of W., the avowant justif
The plaintiff, in his plea in bar, set up a
de vicinage, averring, that, in the exerci

COMMON.

Pur Cause de Vicinage—(Continued.)

moners were no parties, and which therefore did not in itself operate as a notice of extinguishment to them. Wells v. Pearcey, 426.

2. Quære, whether a notice in fact to the commoners of W. (*without inclosure*) that all rights of common in B. were extinguished, would put an end to the legal excuse of trespasses pur cause de vicinage. Id. 441.

3. Semble, that the cattle would be liable to distress, or the owner to an action of trespass, notwithstanding the want or defect of fences, if the cattle were suffered to remain in the locus in quo after notice to the owner that they were trespassing there. Id. 435.

4. Nature of common pur cause de vicinage. Id. 440.

5. Mode of terminating it. Id. 441.

CONDITION PRECEDENT—*See* GOODS BARGAINED AND SOLD.

COPYHOLD.

The assignment of the estate and effects of an insolvent debtor under ss. 11 & 19 of the 7 Geo. 4, c. 57, vests in the assignees any copyhold property the insolvent may possess, so as to enable them to maintain ejectment. The entry on the court rolls of the manor, required by s. 20, is only necessary to enable the assignees to convey the property to a purchaser. Doe d. Brenan v. Glenfield, 699.

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Assignment of—See PLEADING, 11.

CORPORATION.

By letters patent king Charles the First granted to the mayor and burgesses of Lyme Regis the borough or town so called, and also the pier-quay or cob, with all liberties and profits &c. belonging to the same, and remitted also a rent of twenty-seven marks antiently payable by the corporation to the king; and the king willed that the said mayor and burgesses and their successors all and singular the buildings, banks, sea-shores, &c., within the said borough or thereto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth for ever should repair, maintain, and support, as often as it should be necessary:—Held, that the corporation, having accepted the charter, became bound to repair the buildings, banks, sea-shores, &c.; and that they were liable in an action on the case at the suit of an individual for an injury resulting from their neglect to discharge their duty. The Mayor &c. of Lyme Regis v. Henley, 29.

COSTS.

Of Counts and Issues.

1. Before the issue was made up the cause was referred; the costs of the cause were to abide the event of the award. The arbitrator

2. The court refused to allow the costs in which the plaintiff had been nonsuited imposed by way of penalty upon the att this cause, for which costs an attachm Warne, 584.

3. To a declaration consisting of a coun counts for work and labour, the defenda count, that he did not accept the bill, and sit, and afterwards obtained a judge's or into court upon the first count. The plai dict upon the first count, on the ground t had not been pleaded, as required by the 4 Will. 4.:—Held, that he was entitled Adlard v. Booth, 644.

4. By the 10 Geo. 4, c. 44, s. 41, where any member of the metropolitan police f ance of that act, and the defendant recove is nonsuited or discontinues, the defend between attorney and client:—Held, that t by the 3 & 4 Will. 4, c. 42, s. 32; and there sons are made defendants with others, th certify that there was reasonable cause for in order to deprive them of costs. Hump

Of Motions and Rules.

5. Where a judge at chambers decline mons, the court will not afterwards enter subject of such costs. Davy v. Brown, 384

6. If the plaintiff recover a verdict in a endeavour, on a rule nisi being obtained for damages, to support his verdict to the ext entitled to nominal damages, he is not e

COSTS.

Of Motions and Rules—(Continued.)

upon which the courts of equity proceeded in like cases before the passing of the statute, or by the practice that obtained with respect to the costs of a mandamus under the 13 Geo. 3, c. 63, s. 44. Brydges v. Fisher, 485.

8. The cross-examination by the adverse party of a witness examined by commission, is no ground for charging him with the costs. Id. 488.

Under 43 *Geo.* 3, *c.* 46, *s.* 3.

9. Where a defendant obtains costs under the 43 Geo. 3, c. 46, s. 3, on the ground that the arrest was without reasonable or probable cause, neither party is entitled to the costs of a prior unsuccessful motion to enter a nonsuit. Bradley v. Milnes, 697.

Extra Costs.

10. On a bill filed by vendor against purchaser, for not accepting the title, the bill having been dismissed with costs:—Held, that the purchaser could not afterwards recover the extra costs of the equity suit, in an action for damages sustained by him in consequence of the non-completion of the title. Hodges v. The Earl of Litchfield, 450.

Attachment for Non-payment of—See ATTACHMENT.

Attorney's Lien for—See ATTORNEY, 7, 8, 9.

Against Executors and Administrators—See EXECUTORS AND ADMINISTRATORS.

Under the Interpleader Act, 1 *&* 2 *Will.* 4, *c.* 58—*See* SHERIFF, 2, 3, 4.

COVENANT.

The plaintiffs, as assignees of one J. S., a bankrupt, declared in covenant on a deed under the seal of the defendants and one H. P., since deceased, whereby they covenanted with J. S, before his bankruptcy, to pay him certain yearly rents, until he should grant certain leases which he had covenanted by that deed to grant. The defendants pleaded, that, by another deed of the same date with the former, and made between the defendants and H. P. of the one part, and J. S. and the several other persons whose names and seals were thereto subscribed and set, of the other part, and also by certain articles of agreement, set out in the plea, and referred to and confirmed by the deed, J. S. and the several other persons mentioned in that deed, had formed themselves into a society called the British Building Society, for the purpose of erecting a number of houses, not exceeding forty, to be paid for out of a fund to be raised by monthly subscriptions of the members; that J. S. had agreed to demise the land on which the houses were to be built, on certain stipulated rents; and that the leases should be made to and executed by the trustees of the society (the defendants and H. P.), in trust for the benefit of the

by the plaintiffs, would not go to any part
own separate property; and the damages
partnership fund, but by the trustees in the
contract, with a right to a future and unce
members of the society. Bedford v. Brutt

And see LANDLORD AND TENANT, 4—PL

DEED OF SEPARATION—*See* HUSBAND A

DEPARTURE—*See* PLEADING, 15.

DEVISE.

Construction of.

1. J. S., being tenant in tail in p
remainder to his son in tail, &c., and
being also seised in fee of lands in W
recovery of the lands in C., devised "
and wheresoever, over which he had a
and his heirs, in trust for the testator'
mainders in tail, and created various
debts and annuities as the personalty
charge, and also of marriage portions
Held, that the reversion in fee of the
—the words of the devise being suffic
and no intention to exclude it being e
implied from any other part of the will

2. Testator devised property to tw
fourth parts, to pay to *or permit and*
ters respectively *to receive* each one f
and profits to their respective sole an
other fourth, in trust to pay to *or per*
the *clear* yearly rents and profits, wit

DEVISE—(*Continued.*)

Power to appoint new Trustees.

3. Testator directed, that, in the event of the death of one of the trustees named in his will, or upon his refusing to act, a new trustee should be appointed in his place, by the surviving or continuing trustee, and thereupon the trust estates should be conveyed to and vested in the surviving or continuing and the newly-appointed trustee or trustees jointly. One of the trustees died, and the survivor, declining further to act, by a deed *to which the cestuis que trust were parties*, conveyed the property to the defendant, to hold to him, his heirs and assigns, upon the trusts of the will:—Held, that, by this conveyance, the legal estate became vested in the defendant. White v. Parker, 542.

And see RENT-CHARGE.

DILAPIDATIONS—*See* LANDLORD AND TENANT, 1.

DISTRESS. *Fraudulent Removal to avoid Distress—See* LANDLORD AND TENANT, 2.

DOWER.

1. In a writ of dower, in support of a plea of election by the widow to take an annuity secured to her by deed in lieu of dower, the tenant proved a receipt by the demandant after issue joined and before trial, of certain dividends mentioned in the deed:—Held, that this, standing alone, was not sufficient evidence to warrant the court in holding (after verdict for the demandant) that the demandant had elected to take the annuity in satisfaction of her dower:—Held, also, that an order made in a suit in equity to which the tenant was no party, and which contained a proviso that the receipt of the money by the demandant should be without prejudice to her right to dower, was admissible to shew quo animo she received it. Slatter v. Slatter, 82.

2. Quære, whether a court of law can properly take cognizance of an election by the widow to take something in lieu of dower. Id.

EJECTMENT.

Service of Declaration and Notice.

1. Service of a declaration in ejectment on the bailiff of the tenant, is sufficient foundation for judgment against the casual ejector, where it appears to have duly come to the hands of the tenant's attorney, who promises to appear. Tenny d. Mills v. Cutts, 52.

2. Service of a declaration and notice in ejectment upon a servant of the tenant upon the premises, is not sufficient, unless the servant makes an affidavit (or it otherwise appears) that they came to the tenant's hand; or, where this cannot be procured, unless considerable diligence be shewn to have been used to serve the tenant personally. Doe d. Pugh v. Roe, 464.

EJECTMENT—(*Continued.*)

Motion for Judgment.

3. To found a motion for judgment against the casual ejector, a declaration intituled thus, "In the Common Pleas, June 12, 1834," will suffice, notwithstanding the 15th rule of Michaelmas Term, 3 Will. 4, does not apply to actions of ejectment. Doe d. Ashman v. Roe, 166.

ELECTION—*See* DOWER.

EVICTION—*See* LANDLORD AND TENANT, 4.

EVIDENCE.

What admissible.

1. In a writ of dower, in support of a plea of election by the widow to take an annuity secured to her by deed in lieu of dower, the tenant proved a receipt by the demandant, after issue joined and before trial, of certain dividends mentioned in the deed:—Held, that this, standing alone, was not sufficient evidence to warrant the court in holding (after verdict for the demandant) that the demandant had elected to take the annuity in satisfaction of her dower:—Held, also, that an order made in a suit in equity to which the tenant was no party, and which contained a proviso that the receipt of the money by the demandant should be without prejudice to her right to dower, was admissible in evidence to shew quo animo she received it. Slatter v. Slatter, 82.

2. To an action on a promissory note for 100*l.* made by the defendant on the 12th December, 1833, payable six months after date, to the order of K., and by K. indorsed to the plaintiff, the defendant pleaded, that, on the 23rd July, 1833, he lost money at play to one A., and that the note was given to secure the money so lost. The

EVIDENCE.

What admissible—(Continued.)

that the purchaser should not require the production of any title *prior to the lease.* In an action against a bidder for loss on a re-sale, in consequence of his not completing the purchase, the declaration stated that the plaintiff was possessed of "a certain lease," describing it:—Held, that he was bound to support that allegation by proof of the lease in the ordinary way, viz. by calling the attesting witness, or properly excusing his absence; and that proof of an assignment to himself (prepared by the solicitor of the lessor), and of his occupation under it for ten years, was not sufficient—nothing having occurred between the parties to amount to an admission on the part of the purchaser of the genuineness of the lease. Laythoarp v. Bryant, 327.

Admissions and Conversations.

6. Evidence of what passed in a conversation between the buyer and seller of goods at the time of the sale, is admissible, notwithstanding it may tend to let in a set-off since barred by the statute of limitations. Moore v. Strong, 367.

7. Upon an issue whether or not a trader had committed an act of bankruptcy on or before the 5th March, letters written by him on the 16th January, to the holders of bills, to become due in February, praying for time, were held admissible for the purpose of shewing him to be in embarrassed circumstances, and as tending to give a colour to his absenting himself from his home and business from the 16th February to the 9th March. Smith v. Cramer, 541.

Entries and Declarations of Deceased Persons.

8. An entry of the presentment and dishonor of a bill of exchange, in a book kept in the office of a notary, by a clerk who presented the bill, proved to have been made at the time, and in the ordinary course and routine of the office, is admissible evidence to shew the presentment and dishonor of the bill, on proof of the death of the clerk. Poole v. Dicas, 600.

9. In a writ of right, declarations of a deceased occupier of the premises demanded, that he held them as tenant to the person under whom the demandant claims, are admissible (valeant quantum) to shew seisin in that person. Carne, dem., Nicoll, Ten., 466.

Interest of Witness.

10. H. F., being employed by the plaintiff to procure a bill to be discounted for him, placed it in the hands of the defendant for that purpose; the defendant (with notice) detained the bill as a set-off against a debt due to him from H. F. and another:—Held, that H. F., having an equal interest in the event of the suit either way, was a competent witness to prove these facts in an action of trover brought by the plaintiff for the bill. Fancourt v. Bull, 645.

action having been properly bro
plaintiff was induced to bring it
sentation on the part of the de
Vaughan dissenting.] The mer
plied to, refuses to state the g
will not suffice. Southgate v. C

2. Where an executor has cor
diligence to ascertain that he ca
of success, or is guilty of any
expense or vexation to the defe
excuse him from costs, in exerci
the 31st section of the 3 & 4 V
173.

And see Baker v. Gostling, 5

Plea of Outstanding Judgments, by.

3. The 8th rule of Hilary Te
recovered, does not apply to a p
covered against the testator, whe
v. Izod, 119.

FEE-FARM RENT—*See* ARREST.

FEME COVERTE—*See* HUSBAND AND

FINES AND RECOVERIES—*See* AM

The conusee died in England afte
of two of three conusors in India,
ledgment of the third in this country
as to the two former only. Griffith'

FREIGHT.

Assignment of.

In assumpsit by assignees of
bankrupt) before his bankruptcy

FREIGHT.

Assignment of—(*Continued.*)

of such further sums as might be due or owing from C. to I. & Co. for costs of insurance, and upon the balance of all accounts between them, not exceeding in the whole 3000*l.*; that C., for the considerations aforesaid, assigned to I. & Co., their executors, &c., all and every the said sum and sums of money that was or were due, or which should or might at any time or times thereafter arise and become due to him C. by any person or persons "for or on account of the freight, earnings, and profits of the ship N. under or by virtue of any then existing or future charter-party or charter-parties, or other contract or contracts, *for or in respect of her said then intended voyage to India and back to England*"—in trust for I. & Co. to reimburse themselves the 1600*l.* and interest, together with such further sums as might be due to them upon the balance of accounts between them and C., not exceeding in the whole 3000*l.*, rendering the surplus to C.—of which assignment the defendant had notice; that C. was indebted to I. & Co. in the sum of 2384*l.* 4*s.* 11*d.*, *which sum exceeded the amount due for freight as in the declaration mentioned*:—Held, that the plea was a good answer to the action—the assignment being of the freight of a single intended voyage then in course of being performed, and there being no surplus in which the creditors of C. had an interest so as to entitle the assignees to sue as trustees. Leslie v. Guthrie, 683.

FRAUDS, STATUTE OF—*See* Goods Bargained and Sold.

FRAUDULENT PREFERENCE—*See* Bankrupt, 3.

FRAUDULENT REMOVAL—*See* Landlord and Tenant, 2.

GAMING—*See* Bills of Exchange, 4, 5.

GOODS BARGAINED AND SOLD.

The plaintiffs sold to the defendants a quantity of Sligo butter, which it was provided by the contract should be shipped for London in October, and be paid for by bill at two months from the date of landing. The butters were on the 6th November shipped by M. & S. of Sligo, addressed and invoiced to the plaintiffs, and by the bill of lading made deliverable to their order. On the 10th, the defendants were informed that the butters were not shipped within the time provided by the contract, and, though they at first demurred, they subsequently verbally consented to waive the objection, and accepted the invoice and the bill of lading, which the defendants indorsed to them. The invoice specified the weights and prices of the several firkins. The vessel on board of which the butters were shipped was wrecked, and part of the butters were lost, and the remainder damaged. In indebitatus assumpsit for goods bargained and sold, the jury found that the defendants had waived the performance of the condition as to the shipment of the butters in October:—Held—first,

the price. Alexander v. Gardner, 630.

GRANT—*See* CORPORATION.

GUARANTIE.

Construction of.

1. To constitute a valid agreement to
of a third person, within the 4th secti
is not necessary that the consideration sl
it is enough if the memorandum be so
nary capacity must infer from the pe
other was the consideration upon whicl
Hawes v. Armstrong, 661.

2. No consideration is to be implied
lows:—"Inclosed I forward you the bi
and accepted by L. D., which I doubt
in default thereof, I will see the same p

3. Nor from the following—"Mr. B
to proceed thither in the Mary, having
amounting to 49*l.* 5*s.*, with the unders
the amount to you three months after h
does, we guarantee his performance of
failure thereof, we will be responsible to

HOUSE OF LORDS.

Practice in.

The judges declined to answer a que
House of Lords, it being doubtful wh
strict legal construction of existing stat
embrace that of a bill pending before th
and Westminster Bank, 4.

HUSBAND AND WIFE.

HUSBAND AND WIFE—(*Continued.*)

to say, a certain deed of separation between the plaintiff and his wife, and agreed to pay the debts in full, &c. The defendant pleaded, that, at the time of making the agreement, the plaintiff was solely liable to make the several payments, the supposed agreement by the plaintiff to pay which was by the memorandum stated to be the consideration for the defendant agreeing as was alleged to be in the said memorandum agreed by him: Held, that the plea was no answer to the declaration, inasmuch as it disclosed no facts tending to shew that any part of the consideration for the defendant's promise was illegal. Waite v. Jones, 730.

And see BAIL-BOND, 2—INFANT, 3—PLEADING, 14.

INCLOSURE ACT—*See* COMMON.

INFANT.

Contracts by.

1. The defendant, an infant in low circumstances, hired of the plaintiff a house containing five rooms (at the rent of 15*l.* per annum), in which he carried on his business of a barber. In an action for use and occupation, it was left to the jury to say whether such a house was *necessary* for a person in the station in life of the defendant. The jury having found in the negative, the court refused to disturb the verdict. Lowe v. Griffith, 458.

2. A joint *and several* annuity granted by two persons, one of whom is an infant, though void as to the infant, by the statute 53 Geo. 3, c. 143, s. 8, is still good as against the other grantor. Gillow v. Lillie, 597.

Acknowledgment by Infant Female.

3. To meet the special circumstances of the case, the court directed the commissioners for taking the acknowledgment of a married woman (an infant) in their certificate made in pursuance of the 3 & 4 Will. 4, c. 79, s. 84, to omit the words "of full age." In re Luke, 80.

In Execution for Damages.

4. The court has no power to discharge an infant in execution for damages and costs recovered against him in an action of slander. Defries v. Davis, 59.

INROLMENT—*See* ATTORNEY, 1—4.

INSOLVENT DEBTOR.

What passes by Assignment.

1. The assignment under the 11th section of the insolvent debtors' act, 7 Geo. 4, c. 57, vests the property of the insolvent in his assignees only from the time of its execution. Therefore, where an insolvent went to prison on the 13th April, on the 14th sold to the defendant (his landlord) certain fixtures on the premises he had occu-

2. The assignment of the estate and
under ss. 11 and 19 of the 7 Geo. 4, c.
copyhold property the insolvent may p
maintain ejectment. The entry on th
quired by s. 20, is only necessary to
the property to a purchaser. Doe d.

3. Trover lies at the suit of the a
against an execution creditor for a sa
the insolvent's imprisonment, of goo
issued upon a warrant of attorney—7
Minter, 616.

INSURANCE.

Hides were shipped on board a vessel
The ship sailed from Valparaiso on the 1
put into Rio in consequence of damage b
found that the hides were so much damaged
to carry them in specie to the termination
such a state that they must either have be
or thrown overboard, they were sold at Ri
On the 23rd July, the ship set sail from R
and was stranded on the 29th September, a
In an action on a policy containing a memo
hides free of particular average, unless the
first, that this was not such a stranding of
sured to recover for an average loss—secon
structive only, and not an *actual* total loss
donment was necessary to entitle the plai
vador, 491.

INTEREST—*See* Affidavit to hold to Bail,

INTERPLEADER ACT—*See* Practice, 19,

LANDLORD AND TENANT.

General Liability of Tenant to Repair.

1. The jury having given damages (under 20*l.*) in an action by landlord against tenant, for an injury to the former, arising from the tenant's quitting premises occupied by him as tenant from year to year, without having done repairs he was bound to do—The court refused to disturb the verdict, although it appeared that the larger portion of the repairs required ought to have been done by the landlord himself. Woods v. Pope, 536.

Fraudulent Removal.

2. The right of the landlord, under the 11 Geo. 2, c. 19, s. 8, to follow the tenant's goods, in the case of a fraudulent and clandestine removal, does not attach unless the rent has actually become due before the removal of the goods. Rand v. Vaughan, 670.

Action for Double Value.

3. Tenants in common cannot jointly maintain an action for double value, where the premises have been held over after the expiration of a tenancy from year to year, without proof of a joint demise. Wilkinson v. Hall, 675.

Eviction, Plea of.

4. In covenant for non-payment of rent reserved by a lease, containing a clause prohibiting the carrying on of certain trades upon the demised premises without the license of the lessor, the defendant pleaded that his immediate lessor, who held under one A. C., subject to a similar covenant, gave him a license to carry on one of those trades, and that, by reason and on the ground that the defendant so carried on such trade, R. C., "having good right and title to the demised premises, as heir-at-law of A. C.," evicted the defendant:—Held, that the plea not negativing that the trade was carried on with the license of the original lessor, did not disclose such right in R. C. to evict, as to afford an answer to the plaintiff's claim for rent. Simons v. Farren, 105.

LEASE.

Stamp on—See STAMPS, 1.

LETTERS PATENT—*See* CORPORATION.

LIEN—*See* ATTORNEY, 7, 8, 9.

LIMITATIONS, STATUTE OF—*See* STATUTE OF LIMITATIONS.

LITERARY PROPERTY.

Assignment of—See PLEADING, 11.

LORDS' ACT—*See* PRISONER, 2.

liable in trover. Id.

MEMORANDA, 290, 1, 2, 746.

METROPOLITAN POLICE—*See* Costs, 4.

MIS-DESCRIPTION—*See* Sale, 1, 2.

MONEY HAD AND RECEIVED.

Where maintainable—See Partners.

A., a clerk to justices, verbally agre
him, and to allow him half the fees o
should say he ought to do so. C. an
approved of this arrangement. B.
that he might maintain an action for
the fees received by A. Rowland v.

MONEY PAID INTO COURT—*See* Costs,

NECESSARIES—*See* Infant, 1.

NEW TRIAL.

Though by the 4 & 5 Will. 4, c. 62, s. 2
Common Pleas at Lancaster, the motion
to be made in *any one* of the courts at We
it to be made in the court of which the ju
member. Forster v. Jolliffe, 54.

NOTICE.

Of Dishonor—See Bills of Exchange, 1,
To plead—See Practice, 10.

NUL TIEL RECORD—*See* Practice, 29.

OUTLAWRY

PARTICULARS OF SALE—*See* SALE.

PARTNERS.

Liabilities for the Acts of each Other.

One F., a partner in the plaintiffs' house, transferred certain stock out of the defendant's name in the books of the Bank of England, under a forged power of attorney, and without any authority from her, and caused the produce to be mixed with the money of the firm. F. having been convicted of another forgery committed under similar circumstances, and executed:—Held, that the defendant might recover the amount in an action against the surviving partners for money had and received. Marsh v. Keating, 5.

And see COVENANT.

PAYMENT.

Of Money into Court—See COSTS, 3—PRACTICE, 27.

Plea of Payment in Satisfaction—See PLEADING, 11.

PLEADING.

ASSUMPSIT.

Declarations in.

1. The declaration stated, that, in consideration that the plaintiff at the request of the defendant had given the defendant a certain letter, by means of which he was enabled to end disputes and differences that had arisen between himself and a third party, and to recover certain property, the defendant promised to give the plaintiff 1000*l.*:—Held, that this declaration disclosed a sufficient consideration for the defendant's promise. Wilkinson v. Oliveira, 461.

Pleas.

In Abatement.

2. A plea of privilege by an attorney of the King's Bench sued by writ of summons in this court, must be verified by affidavit, or the plaintiff may treat it as a nullity, and sign judgment. Davidson v. Chilman, 117.

In Bar.

3. A plea to an action on a bill of exchange, by an indorsee against the acceptor, that the bill was accepted without any consideration passing from the drawer to the acceptor:—Held bad, on demurrer. Lowe v. Chifney, 95.

4. In an action on a bill of exchange (by indorsees against acceptors), a plea merely averring that the defendants were defrauded of the bill, and that the *acceptance* was given without consideration:—Held, bad. Bramah v. Roberts, 350.

5. J. S. mortgaged premises to the plaintiff for 8000*l.*, with a proviso for redemption on payment of the principal on a certain

attorney to confess judgment for 16,00
that no execution should issue upon t
fault should be made in payment of th
annual sum to be paid to the trustees
should be made in any such payment,
plaintiff at any time *from time to tim*
the said judgment *for the whole or any*
and interest, and all costs occasioned b
Judgment was accordingly entered u
ney for 16,000*l.* 5*s.* Default being m
annual sum covenanted to be paid t
sued out a testatum ca. sa. for 802*l.* 2*s.*
ment, by virtue of which writ J. S. w
wards agreed between the plaintiff
payment to the undersheriff of the ex
der which J. S. was then in custody,
the defendant engaging that he should
ture time within twelve months, in ca
plaintiff to be necessary to issue anot
To a declaration setting forth the abo
it did become necessary within the t
other execution against J. S., and tha
issue another execution against him u
7215*l.* 9*s.* 1*d.*, then remaining due
upon the said indenture of mortgag
lected to procure J. S. to be forthcomi
the time of the suing and prosecuting
sa., and also at the time of the arrest
the making the promise in the decla
sum of 8000*l.* was not, nor was any

PLEADING.
ASSUMPSIT.
Pleas.
In Bar—(Continued.)
as to merchants' accounts, need be pleaded specially. Moore v. Strong, 369.
7. The 8th rule of Hilary Term, 4 Will. 4, as to pleas of judgment recovered, does not apply to a plea by an executor of judgments recovered against the testator, whereby the assets are absorbed. Power v. Izod, 119.
What may be given in Evidence under Non Assumpsit.
8. Under non assumpsit to a count for goods bargained and sold, evidence may be given that the contract was made subject to conditions which have not been complied with on the part of the vendor. Alexander v. Gardner, 281.
9. Want of consideration, or any matter other than a direct denial of the contract, cannot be given in evidence under non assumpsit. Passenger v. Brooks, 560.
10. In assumpsit by an attorney to recover his bill of costs for preparing a deed, and also costs of an action instituted in pursuance of that deed, in which action his client failed in consequence of the deed having been held void on the ground of maintenance:—Held, that the defendant could not set up the illegality of the contract in answer to the action, under a plea of non assumpsit. Potts v. Sparrow, 578.
11. In assumpsit for money agreed to be paid by the defendant to the plaintiff for a dramatic piece composed by the plaintiff, and the sole right of acting and representing the same, bargained and sold by the plaintiff to the defendant, and for money due upon an account stated—the defendant cannot set up the want of an assignment in writing as a defence to the action, unless it be specially pleaded. Barnett v. Glossop, 621.
Replications.
12. To a declaration in assumpsit by the assignee of an insolvent debtor, for goods sold, &c., the defendant pleaded that he paid a certain sum in full satisfaction and discharge of the promise in the declaration, and that the insolvent accepted and received the same in full satisfaction and discharge. The plaintiff replied that the defendant did not pay the insolvent the sum mentioned in full satisfaction and discharge, nor did the insolvent accept and receive the same in full satisfaction and discharge:—Held, good, on special demurrer. Webb v. Weatherby, 477.
13. In assumpsit for work and labour, the defendant pleaded, that, by agreement between the parties, the sum demanded was to be paid to the plaintiff upon his completing the work to the

PLEADING.

ASSUMPSIT.

Replications—(*Continued.*)

satisfaction of the defendant *or* his surveyor, and that the work was not completed to the satisfaction of the plaintiff *or* his surveyor. The plaintiff replied that the work was finished to the satisfaction of the defendant *and* his surveyor, without this that it was not finished to the satisfaction of the defendant *or* his surveyor. At the trial it was proved that the work was done to the satisfaction of the defendant:—Held, that the issue was substantially proved, and that the replication was unexceptionable after verdict. Bradley v. Milnes, 626.

14. To assumpsit for work and labour as an attorney, the defendant pleaded that the demand was for charges "at law *and* in equity," and no bill delivered. Replication, that the charges mentioned in the declaration were not for charges "at law *and* in equity:"—Held, on special demurrer, that the replication was ill, though following the words of the plea: the plaintiff should have traversed disjunctively, in the words of the statute. Moore v. Boulcott, 122.

15. To a declaration in the common form on a bill of exchange (indorsee against acceptor), the defendant pleaded, that, at the time of the drawing, acceptance, and indorsement of the bill, the drawer was a married woman, and that her husband was still living. The plaintiff replied that the bill was drawn and indorsed by the feme as the agent and by the authority of her husband:—Held, a sufficient answer to the plea, and no departure from the count. Prince v. Brunatte, 342.

[redacted]

PLEADING.

ASSUMPSIT.

Replications—(Continued.)

plaintiffs replied that their immediate indorser did not indorse the bill without value or consideration for so doing, but that they took it for a good and valuable consideration; concluding to the country:—Held, good, on special demurrer. Prescott v. Levi, 726.

Demurrers.

19. To a declaration consisting of two counts—the first against the defendant as the acceptor of a bill of exchange—the other on an account stated—the defendant (without a rule to plead several matters) pleaded "that he did not accept the bill of exchange in the declaration mentioned; and, for a further plea, that he did not account with the plaintiff as in the declaration was alleged." The plaintiff signed judgment as for want of a plea:—Held, that the informality could only be taken advantage of on special demurrer. Vere v. Goldsborough, 265.

20. Semble that two pleas of set-off may be pleaded to two several counts of a declaration: or, if demurrable, that it must be on the ground of misjoinder. Gibson v. Bell, 721.

CASE.

Declarations.

21. The declaration stated that the plaintiff was possessed of a close and pond under a demise from the defendant; that the defendant was possessed of a close *used and employed by him as a private road*, adjoining the plaintiff's close and pond; and that the defendant wrongfully cut and made *in his said close used as a private road* a certain sewer, and kept and continued the same adjoining the plaintiff's close and pond, and thereby diverted the water from the plaintiff's pond. It appeared from the evidence, that the making of the road was preceded by the making of the sewer, and that the water was abstracted from the pond for the purpose of building the sewer.

Quære, whether the injury of which the plaintiff complained was properly described in the declaration, that is, whether the allegation that the defendant used his close as a private road, applied to the time of the injury or to the time of declaring; or whether there was a variance between the declaration and proof: but—

Held, that, at all events, the allegation that the defendant's close was used by him as a private road, was surplusage, and need not be proved. Dukes v. Gostling, 570.

22. Held, also, that the defendant was by the rule of Hilary Term, 4 Will. 4, "Case," 1, precluded from taking advantage of this objection under not guilty. Id.

caused him to be taken by a police
and there detained until he procur
who had the warrant in his possessi
at the police station, the plaintiff wa
cross Street prison by virtue of the
tained in custody thereon from the
January, when he obtained a judge'
the ground that the arrest was illega
ever, been lodged against him, he r
28th January. In an action again
J., the sheriffs justified the taking
station to White-cross Street, and h
writs. The jury having found a v
general damages for the whole of
ment charged in the declaration:—
riffs might be liable for the wrongfu
and acted upon by W. J.; yet tha
these facts in evidence under the ge
as an answer to the sheriffs' pleas, s
damages for what passed subsequent
tiff to the police station; but that,
self of them for the purpose of con
into an illegal act, he was bound by
ply them specially. Price v. Peek,

COVENANT.

24. In covenant for non-payment of ren
ing a clause prohibiting the carrying on
demised premises without the license c
pleaded that his immediate lessor, who h
to a similar covenant, gave him a licen

PLEADING—(*Continued.*)

DEBT.

25. In debt for rent due upon a lease, the declaration stated that all the estate, &c. of the lessee of and in the demised premises by assignment thereof came to and vested in the defendant, and that certain rent became due after the assignment. The defendant traversed this averment in the words of the declaration. At the trial, it appeared that the father of the defendant, in the year 1813, purchased a third of the premises comprised in the lease, which came to the defendant as his personal representative on the death of his father. The issue having been found for the defendant—Held, that he was entitled to the verdict. Curtis v. Spitty, 737.

DOWER.

26. Plea of election by a widow to take an annuity secured to her by deed in lieu of dower. Slatter v. Slatter, 83, n.

TRESPASS.

27. In trespass for seizing goods, the defendants pleaded that a commission of bankrupt issued against one J. S., under which all his goods were assigned to C. and M., that the goods in question were the goods of C. and M. as such assignees, and that the plaintiff, claiming title to the goods under colour of a gift thereof to him by J. S., became possessed of them; and justified the seizing of them as the servant and by the command of the assignees. The plaintiff replied that the goods in the declaration mentioned were not the goods of C. and M. as such assignees, but were the goods of him the plaintiff:—Held, that, by this replication, the commission and assignment to C. and M. were admitted, and that the only issue to be tried was as to the plaintiff's title to the goods. Jones v. Brown, 453.

TROVER.

28. In trover for a bill of exchange, the defendant pleaded that one H. F., who was the drawer of the bill, and the person to whose order the same was made payable, was lawfully possessed thereof, and indorsed it to F. P., and that F. P. before the bill became due, for a good and valuable consideration, indorsed the same to the defendant. The plaintiff replied that there never was a good or valuable consideration for F. P.'s indorsement to the defendant:—The jury having found for the plaintiff upon this issue—the court refused either to arrest the judgment or to award a repleader. Fancourt v. Bull, 645.

Rules to plead several Matters—See PRACTICE, 11—15.

Amendment of Pleadings—See AMENDMENT, 5—8.

POLICE—*See* COSTS, 4.

POWER.

To appoint New Trustees—See DEVISE, 3.

4. The court refused to discharge a de
ground of *trifling* defects in the process
rested. Pocock v. Mason, 51.

5. Where the word "execution" was
in the indorsement on a writ of capias, t
bail-bond to be cancelled, but allowed the
ment of costs. Shirley v. Jacobs, 67.

6. To induce the court to discharge a
the ground of no debt being due, the
ceedingly strong to shew that the arrest i
the court. Tucker v. Tucker, 463.

7. J. S. mortgaged premises to the pla
viso for redemption, on payment of the
and interest half-yearly in the meantime,
to certain trustees named in the deed 5*l.*
principal as should be from time to time
fund towards the liquidation of the princip
8000*l.*, J. S. gave a warrant of attorne
16,000*l.*, subject to a defeazance that no
the said judgment until default should b
8000*l.* or interest or the annual sum to b
that, in case default should be made in
be lawful for the plaintiff at any time *fr*
cution upon the said judgment *for the w*
the 8,000*l.* and interest, and all costs occ
thereof. Judgment was accordingly en
attorney for 16,003*l.* 5*s.* Default being
annual sum covenanted to be paid to th
out a testatum ca. sa. for 802*l.* 2*s.* found
virtue of which writ J. S. was arrested.
between the plaintiff and defendant th

PRACTICE.

Process—(Continued.)

it not appearing that J. S. was to be charged in execution a second time for the same identical debt. Atkinson v. Bayntun, 404.

8. Quære whether, under the circumstances, even a second execution for the same debt would be illegal. At all events, successive executions might issue for other portions of the judgment, in respect of which J. S. should from time to time make default. Id.

And see AMENDMENT, 1—4.

Time for declaring

9. Where one of two defendants is in custody, and the plaintiff is proceeding to outlawry against the other, he must apply to the court or a judge for time to declare against the prisoner until the outlawry of the other is perfected. De Lannoy v. Benton, 386.

And see QUARE IMPEDIT.

Notice to plead.

10. The court refused to set aside for irregularity a judgment signed for want of a plea, where the declaration (against a prisoner) had been delivered without any notice to plead. Clementson v. Williamson, 267.

Leave to plead several Matters.

11. Motion for leave to plead several matters—1. non-assumpsit—2. payment as to part—3. as to part, that the goods were warranted like the sample—4. as to part, that the goods were warranted to be of good merchantable quality—5. that they were warranted to be one ton weight of black lead:—First and fourth disallowed. Steele v. Sterry, 101.

12. In an action for goods sold and delivered, and for money paid to the defendant's use—the general issue, and, as to part of the money demanded, that it was paid in the prosecution of illegal bargains:—Allowed. Triebner v. Duerr, 102.

13. In an action on a bill of exchange, the declaration was delivered, and a rule to plead served in Easter Term. On the 12th May, the defendant paid part of the demand with costs, and engaged to pay the remainder on the 1st of October. The defendant failing to pay the balance pursuant to the agreement, the plaintiffs, *without giving a new rule to plead*, signed judgment in Michaelmas Term:—Held, regular. Usborne v. Pennell, 277.

14. In covenant on an indenture of lease by the lessor against the assignees of the assignee of the term, who had become bankrupt, the court allowed the defendants to plead—that the estate and interest of the lessee did not vest in them—and that they, being appointed assignees of the bankrupt, abandoned, declined, and refused to accept the term. Thompson v. Bradbury, 279.

self out as the owner, and deposited them
the custom set out in the second plea—5.
signed by the plaintiff to H. as his agent;
defendants to land and house them, and
claiming a lien as in the second plea. Le

Judgment as in Case of a Nonsuit.

16. The defendant caused the plaintiff t
trate for an alleged assault. The charge b
gistrate, the plaintiff brought an action on
false imprisonment. The defendant havin
ment at the sessions, which was afterward
the court of King's Bench, the plaintiff w
cause in order to await the decision of t
indictment:—The court discharged with c
in case of a nonsuit for not proceeding to tri

Setting aside and staying Proceedings.

17. The court will not entertain objectio
ceedings, where the party has neglected t
nities to urge them at an earlier period, ev
error on the face of the record. Greaves

18. J. S. being in custody under a ca. s
tiff, a fiat in bankruptcy issued against hi
cured his discharge by giving a warrant
ties for the amount of the judgment. At
of the warrant of attorney, one of the sur
to prove for the amount under the fiat, wh
Judgment having been entered up on the
court refused upon a summary application
Duncan v. Sutton, 338.

PRACTICE.

Motions under the Interpleader Act—(Continued.)

act obtained after an injunction granted by the court of Chancery for restraining the execution. Arayne v. Lloyd, 609.

21. The sheriff is not entitled to costs under the interpleader act, unless his application to the court is rendered necessary by gross misconduct on the part of the claimant. Thompson v. Sheddon, 697.

Examination of Witnesses under the 1 *Will.* 4, *c.* 22.

22. A motion for a commission to examine witnesses upon an issue out of Chancery, is properly made to the court in which the trial is to be had. Bordieu v. Rowe, 608.

Incidental Proceedings.

23. Where a judge at chambers declines to give costs on a summons, the court will not afterwards entertain an application on the subject of such costs. Davy v. Brown, 384.

24. The rules of Hilary Term, 4 Will. 4, made under the power given to the judges by the 3 & 4 Will. 4, c. 42, s. 1, apply only to cases in which the the courts have a common jurisdiction, and therefore embrace neither revenue causes nor real actions. Miller, Dem., Miller, Ten. 387.

25. Nor do they apply to quare impedit. Barnes v. Jackson, 525.

26. His majesty's warrant for opening the court of Common Pleas virtually abrogates the rule requiring pleas &c. to be signed by a serjeant. Power v. Izod, 119.

27. Where money is paid into court under the statute 7 & 8 Geo. 4, c. 71, s. 2, in lieu of special bail, it can only be taken out on putting in and perfecting bail—notwithstanding it has been paid in without prejudice to an application to the court for defects in the affidavit of debt. Green v. Glasbrooke, 402.

28. In trespass, where the defendant justifies the taking of goods as done by the command of the assignees of a bankrupt—Semble, that an objection taken by the plaintiff after the judge has summed up, as to the want of evidence of the title of the assignees, came too late. Jones v. Brown, 458.

29. In debt on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of *debt* against J. S. On the production of the record (on a plea of nul tiel record), it appeared that the original action was *on promises*. The court allowed the declaration to be amended, on payment of costs, but required a special application for that purpose. Munkenbeck v. Bushnell, 569.

30. The date of the jurat of an affidavit upon which a judge's order had been obtained, having been altered by the attorney's clerk without re-swearing—The court set aside the order obtained thereon. Finnerty v. Smyth, 744.

charged the rule, but ordered the attorney

PRISONER.

1. The court refused to set aside for irregula
want of a plea, where the declaration (against
vered without any notice to plead. Clementso

2. A motion to bring up a prisoner under th
lords' act, cannot be made after the expiratio
the term. Rogers v. Peckham, 121.

3. Where one of two defendants is in custod
ceeding to outlawry against the other, he mu
judge for time to declare against the prisone
other defendant is perfected. De Lannoy v. B

And see INFANT, 4.

PRIVILEGE—*See* ATTORNEY, 11.

PROMISSORY NOTES—*See* BILLS OF EXCHANGE

PROMOTIONS, 290, 1, 2, 746.

PURCHASER—*See* RENT-CHARGE—VENDOR AND

QUARE IMPEDIT.

Time for counting.

Quare Impedit against three. Two of
moned upon a writ returnable on the 8
peared on the 11th. The sheriff having
third defendant, an alias quare impedit i
able on the 15th April, on which he was
A joint declaration against the three de
the 10th January, 1835:—Held, that, as
the cause was out of court. Barnes v. Ja

REFERENCE—See ARBITRATION

RE-GRANT—(*Continued.*)
recognition of the rent-charge of 200*l.* per annum amounted to a new grant of it. Dennett v. Pass, 218.

REGULÆ GENERALES.
1. Entry of admission of attornies, 289.
2. Termage fees payable by attornies to the clerk of the warrants, 289.
3. The 14th rule of Hilary Term, 2 Will. 4, is virtually rescinded by the statute 2 Will. 4, c. 39, sched. No. 4. Grant v. Gibbs, 390.
4. The rules of Hilary Term, 4 Will. 4, made under the power given to the judges by the 3 & 4 Will. 4, c. 42, s. 1, apply only to cases in which the courts have a common jurisdiction, and therefore embrace neither revenue causes nor real actions. Miller, Dem., Miller, Ten., 387.
5. Nor do they apply to quare impedit—Barnes v. Jackson, 525.

RENT-CHARGE.
1. By a post-nuptial settlement, M., the wife of T. P., became entitled for her life to a rent-charge or annuity of 200*l.* per annum issuing out of the manor of T. and the lands belonging to the same. Under the will of T. P., the settlor, M. became entitled for life to the mansion house at T. and the lands occupied therewith, being part of the premises out of which the rent-charge issued. After the death of T. P., his widow, M., took possession of the mansion house and premises devised to her by the will: —Held, that the rent-charge was extinguished by the grantee's acceptance of part of the land out of which it was made to issue—a devisee who enters and enjoys the subject matter of the devise being a *purchaser* within the meaning of the rule laid down in the 222nd section of Littleton; and this although the devise of the land was expressly made over and above the rent-charge. Dennett v. Pass, 218.
2. By the will, T. P. gave to M. a further annuity or rent-charge of 20*l.* per annum *over and above what he had already settled upon her*:—Quære whether this recognition of the rent-charge of 200*l.* per annum amounted to a new grant of it. Id.

REPAIRS—*See* LANDLORD AND TENANT.

REPLEADER—*See* PLEADING, 28.

REVERSION.
What words in a will sufficient to pass a reversion in fee—Mostyn v. Champneys, 293.

RIGHT OF WAY.
Obstruction of—See CASE.

RIGHT, WRIT OF—*See* WRIT OF RIGHT.

SALE.
Of Goods—See GOODS BARGAINED AND SOLD.
By Auction.
1. Where, on a sale by auction of leasehold property, there is in the

any error or misstatement be inserted in th
misstatement should not vitiate the sale t
purchaser, as the case might happen, shou
tionate value, according to the average of th
as a compensation either way." Flight v. I

2. Therefore, where the particular descri
in the piazza of Covent-garden) as "calcula
ness in the carpet, haberdashery, drapery,
stery, *grocery*, *tea-trade*, &c.;" and stated
the lease prohibiting any "offensive trad
the premises—adding "they cannot be le
or working hatter;" and, on the production
to contain a clause of forfeiture for carry
brewer, baker, sugar-baker, vintner, victua
poulterer, fishmonger, cheesemonger, frui
house keeper, distiller, dyer, brazier, smit
in old iron, pipe-burner, tallow-chandler,
ter," or suffering the premises to be used a
sale of coals, potatoes, or any provisions wha
prohibiting the lessee or his assigns from as
ing the last seven years of the term, witho
of the superior landlord:—Held, that the m
cular was so material, and the difference
arbitrary, that recourse could not be had to
and consequently the purchaser was entitle
and recover back the deposit. Id.

And see VENDOR AND PURCHASER.

SEA WALLS.

Reparation of—See CORPORATION.

SEPARATION DEED—*See* HUSBAND AND WIFE.

SET OFF

SET OFF.

Of mutual Claims for Costs—(Continued.)

cessful defendants might be deducted from the amount of damages and costs payable to the plaintiff by the other defendant, without regard to the lien of the plaintiff's attorney. Id.

3. The court refused to allow the costs of a cause in another court, in which the plaintiff had been nonsuited, to be set off against costs imposed by way of penalty upon the attorney for the defendant in this cause, for which costs an attachment had issued. Dicas v. Warne, 584.

Of mutual Debts or Credits.

4. In an action by assignees of a bankrupt against the defendant for not accepting bills of exchange (pursuant to an agreement with the defendant) in payment for goods sold and delivered by the bankrupt to the defendant:—Held, that the latter might set off a debt due to him for money lent to the bankrupt before his bankruptcy. Gibson v. Bell, 712.

5. Semble that two pleas of set-off may be pleaded to two several counts of a declaration: or, if demurrable, that it must be on the ground of misjoinder. Id. 721.

6. Where an insolvent went to prison on the 13th April, on the 14th sold to the defendant (his landlord) certain fixtures on the premises he had occupied, and on the 18th petitioned for his discharge under the act, at the same time executing the usual assignment of his effects to the provisional assignee:—Held, in *assumpsit* brought by the assignees to recover the price of the fixtures, that the defendant was entitled to set off a sum due to him from the insolvent for rent. Simms v. Simpson, 177.

SHERIFF.

Attachment to stand as Security.

1. The court ordered an attachment against the sheriff to stand as security, where, had bail been put in and perfected, the plaintiff might have set down the cause for the sittings in the term, notwithstanding the accidental circumstance of there being at the time no place for the trial of causes in the Common Pleas in term. Rex v. The Sheriff of Middlesex, 581.

Motions under the Interpleader Act.

2. To entitle a sheriff to a rule under the interpleader act, it must be made clearly to appear that he has not in any manner colluded with either of the parties. Dudden v. Long, 281.

3. Although the sheriff is not usually allowed costs on a motion under the interpleader act, yet, where he has retained possession of the goods seized at the request of the execution creditor, and has sold them with consent of all the parties, and the execution creditor afterwards abandons his claim, the sheriff is entitled to receive from him his costs of such possession and sale. Dabbs v. Humphries, 325.

SIGNING PLEAS, &c.—See PRACTICE, 20—21.

SOLICITOR—*See* ATTORNEY.

SPECIAL CASE.

1. The court will not, under any circumstan
ture of counsel to a special case. Mostyn v.

2. Neither will the court grant a rule callin
cause why he refuses to obtain such signatur
ter in Chancery in pursuance of an order of t

SPECIAL VERDICT.

The court cannot draw from the statemen
dict an inference that the jury have not drawn
cial verdict stated facts that would have war
valid tender, but the jury did not find such t
the tender insufficient. Finch v. Brook, 70.

STAMPS.

On Leases.

1. By one lease two parcels were dem
at distinct rents, with covenants in some
in others to one only of the parcels:—
stamp on the aggregate rent was sufficie

2. In support of an issue of *assignment*,
dence a deed, executed by the defendant
was intended by the parties to be the co
stamped with a duty of 1*l.* 10*s.*, but,
parted with all his interest in the premis
by operation of law an *assignment*:—Hel
in evidence was not admissible for the p
ment, the proper stamp being 1*l.* 15*s.*, un
schedule to the 55 Geo. 3, c. 184, applic

STATUTES.

Decisions on.

Ale	Acts for the regulation of the trade of brewers and retailers of beer	4 Geo. 4, c. 61 5 Geo. 4, c. 54 6 Geo. 4, c. 91 7 & 8 Geo. 4, c. 53 9 Geo. 4, c. 68 1 Will. 4, c. 64	105
Bail	Where debt proved under commission against principal	49 Geo. 3, c. 121, s. 14 6 Geo. 4, c. 16, s. 59	338
	Time for putting in	2 Will. 4, c. 39, sched. No. 4	390
Bail-bond	Assignment of	4 & 5 Anne, c. 16, s. 20.	322
	Fraudulent preference	6 Geo. 4, c. 16, s. 8.	127, 470
Bankrupt	Reputed ownership	21 Jac. 1, c. 19, s. 11 6 Geo. 4, c. 16, s. 72	149
Costs	Metropolitan police	10 Geo. 4, c. 44, s. 41	395
	Where one of several defendants acquitted, &c.	8 & 9 Will. 3, c. 11, s. 1 3 & 4 Will. 4, c. 42, s. 32	395
Executors	Costs where unsuccessful.	3 & 4 Will. 4, c. 42, s. 31	66 173 283 374
Fines and recoveries.	Affidavit of verification	3 & 4 Will. 4, c. 74, s. 83.	52
	Amendment of	3 & 4 Will. 4, c. 74, s. 7	263
Inclosure act	Construction of	3 & 4 Will. 4, c. 40	426
Infant	Acknowledgment of infant female	11 Geo. 4, & 1 Will. 4, c. 60, s. 6 3 & 4 Will. 4, c. 74, s. 84	80
Insolvent debtor	What passes by assignment	7 Geo. 4, c. 57, ss. 11, 19	177, 699
Interpleader act	Where relief granted under	1 & 2 Will. 4, c. 58	281
	Costs under	.....	325, 697
Practice	Irregularity in process	2 Will. 4, c. 39	267, 271
	Motion for new trial of cause in the Common Pleas at Lancaster	4 & 5 Will. 4, c. 62, s. 26	54
	Uniformity of process	2 Will. 4, c. 39	117
	Vacating final judgment, &c., where cause tried before the sheriff	1 Will. 4, c. 7, s. 4 3 & 4 Will. 4, c. 42, s. 19	311, n.
Prisoner	Brought up under lords' act	32 Geo. 2, c. 28, ss. 16, 17	121
Regulæ Generales	Power of judges under the	11 Geo. 4 & 1 Will. 4, c. 70, s. 81 3 & 4 Will. 4, c. 42, s. 1	387
Special case	Under statute	3 & 4 Will. 4, c. 42, s. 25	144
Stamps	Lease—several parcels Other deeds	55 Geo. 3, c. 184	55 58
Statute of limitations.	Merchants' accounts	21 Jac. 1, c. 16, s. 3	369
Watermen	Act for the regulation of	7 & 8 Geo. 4, c. 75	149
Witness	Costs of commission for examination of	1 Will. 4, c. 22, s. 3	485

judgment. At the time of the execution
the sureties requested the plaintiff to pro
which was accordingly done. Judgment
warrant of attorney, the court refused up
onerate the sureties. Duncan v. Sutton,

TENANCY IN COMMON.

Tenants in common cannot jointly mai
where the premises have been held over
from year to year, without proof of a join

TENDER.

What constitutes a valid Tender.

1. The defendant's attorney called
the debt, having the money in his p
tioned the precise sum, and at the
pocket for the purpose of taking out
produce it, the plaintiff saying he
this was a sufficient tender, the pla
actual production of the money; but
tion ought not to have been specially

2. The facts, however, appearing
jury had not *found* that there wa
though the jury might have inferred
Ibid.

TITLE.

Investigation of—See VENDOR AND PURC

TRESPASS—*See* PLEADING, 27.

TROVER.

1. A servant is liable in an action of tr
nefit of his master. Cranch v. White, 31

2. The defendant received from one
that it was the plaintiff's property, and
hands of R. for the purpose of his proc

VARIANCE.

In debt for rent against an assignee, the declaration stated that *all* the estate &c. of the lessee in the premises by assignment came to the defendant. At the trial, it appeared that the defendant was assignee of *a part* only of the premises:—Held, a fatal variance. Curtis v. Spitty, 737.

VENDOR AND PURCHASER.

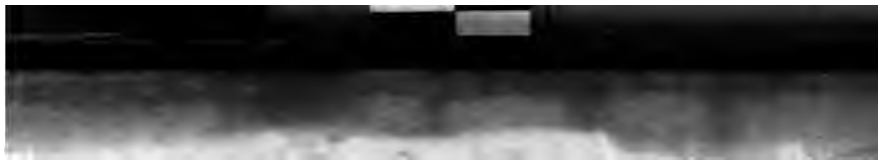
1. On a sale by auction of the unexpired term granted by a lease of which the plaintiff was assignee, one of the conditions provided that the purchaser should not require the production of any title *prior to the lease.* The defendant was the highest bidder, but on the abstract being delivered to him, he immediately returned it, saying that he had merely bid at the request of the vendor. In an action against him for loss on a re-sale in consequence of his not completing the purchase, the declaration stated that the plaintiff was possessed of "a certain lease," describing it:—Held, that he was bound to support that allegation by proof of the lease in the ordinary way, viz. by calling the attesting witness, or properly excusing his absence; and that proof of an assignment to himself (prepared by the solicitor of the lessor), and of his occupation under it for ten years, was not sufficient—nothing having occurred between the parties to amount to an admission on the part of the purchaser of the genuineness of the lease. Laythoarp v. Bryant, 327.

2. The defendant having entered into a contract for the sale of an estate to the plaintiff, the latter objecting to the title, a bill in equity was filed against him for not completing the purchase, which bill was ultimately dismissed with costs. In an action against the vendor to recover damages for the breach of contract:—Held, 1. That the plaintiff was not entitled to recover for expenses incurred by him prior to the contract, including a survey of the estate—2. That he was entitled to recover for the costs of investigating the title, comparing the title deeds with the abstract, and journies for that purpose, and searching for judgments and incumbrances: but not the costs of a conveyance prepared before the title was cleared; nor expenses contracted after the filing of the bill in equity—3. That he was not entitled to the extra costs of the equity suit—4. That he was entitled to the costs of all journies necessarily made in furtherance of the contract; but not to those incurred before the contract was entered into, or pending the equity suit—5. That he was entitled to interest at 5*l.* per cent. on the deposit, though the court of equity had allowed only 4*l.* per cent. Hodges v. The Earl of Litchfield, 443.

WARRANT OF ATTORNEY—*See* SURETY.

WILL—*See* DEVISE.

WITNESS.

Commission for Examination of—*See* COSTS, 7, 8.

WRIT OF DOWER—*See* DOWER.